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1844





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**A TREATISE**  
**ON**  
***THE LAW***  
**OF**  
**WILLS AND CODICILS;**  
**&c. &c. &c.**

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A  
TREATISE  
ON THE  
LAW  
OF  
WILLS AND CODICILS;  
INCLUDING  
THE CONSTRUCTION OF DEVISES,  
AND THE  
OFFICE AND DUTIES  
OF EXECUTORS AND ADMINISTRATORS:

WITH  
An Appendix of Precedents.

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By WILLIAM ROBERTS,  
OF LINCOLN'S INN, ESQ., BARRISTER AT LAW.

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THIRD EDITION,  
MUCH ENLARGED AND IMPROVED.

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IN TWO VOLUMES.  
VOL. II.

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A  
T R E A T I S E  
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WILLS AND CODICILS.

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PART IV.

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CHAP. I.

REVOCATION OF WILLS.

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SECT. I.

*Construction of Sect. 6. of the Statute of Frauds.*

IN the former Volume the constitution, efficacy, and construction of wills have been severally the subjects of enquiry; the alteration, revocation, and restoration of wills, come next to be considered in their order. Before the statute of 29 Car. 2., wills in writing of real estates might be revoked by parol; and, indeed, after that statute, such power would still have existed, (as we may conclude in analogy to the doctrine of holding written agreements revocable by the parties, without writing, notwithstanding the 4th section,) if by the 6th and 22nd sections, special provisions had not been made to prevent it.

Much has been said on the difference in the penning of the 5th section of the statute respecting the execution of a will of lands, and of the succeeding section which prescribes and restricts the methods of revocation. At the end of the case of *Right v. Price* (b) in Douglas's Reports, the learned Reporter has added a note, in which he has animadverted upon the difference in the language of the two clauses, which he attributes to inaccuracy in the composition of the Act; and it cannot be denied that the variation in the terms, where the same principle must have governed, is not easily explainable.

By the 5th section, the testator is not required *to sign in the presence of the subscribing witnesses*; but the subscribing witnesses are called upon to attest *in the presence of the testator*. And Mr. Douglas observes, in the note alluded to, that he believes it is universally understood that, to satisfy this 5th section, a testator must sign in the presence of the witness.

But, by what has been above produced to the reader on this subject, it must have sufficiently appeared to him, that such actual signature, in the presence of the witnesses, is not held to be requisite under the 5th section; and that it is enough, if the testator acknowledges his handwriting to the signature, or publishes and declares it to be his will, when the witnesses subscribe their attestations.

By the clause respecting revocations, the subscription of the witnesses is not expressly directed; while, on the other hand, the signing by the testator in the presence of the witnesses, is positively prescribed. The clause runs as follows: "And moreover, no devise in writing of lands, tenements, or hereditaments, nor any clause thereof, shall at any time, after the said four and twentieth day of June, be revocable, otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, cancelling, tearing,

(b) Dougl. 241.

or obliterating the same, by the testator himself, or in his presence, and by his directions and consent; but all devises and bequests, of lands and tenements, shall remain and continue in force, until the same be burnt, cancelled, torn, or obliterated by the testator, or by his directions in manner aforesaid, or unless the same be altered by some other will, or codicil, in writing, or other writing of the devisor, signed in the presence of three or four witnesses, declaring the same; any former law or usage to the contrary notwithstanding."

As it may reasonably be inferred to have been the intention of the Legislature, to impose the same obligation, as to the formalities of execution, on all wills properly so called, whether original or coming in the place of others antecedently made, a construction has been put upon the language of the revocation clause, which has brought the two sections into equality in this respect, and thus imparted consistency and perspicuity to the statutory restrictions upon the execution of wills. The courts have read the concluding words of the sixth section, *will, or codicil, or any other writing, signed in the presence of three witnesses*, so as to detach the words "will or codicil" from the succeeding words, "or any other writing," coupling these last words with the words which immediately follow, *viz.* "signed in the presence of three witnesses."

Of the grammatical reading of the language of this section, whereby it is brought into agreement with the provisions of the preceding clause.

Thus they have applied the requisition of a "signing in the presence of three witnesses," to the *proximum antecedens* only, "or any other writing;" and again coupling the succeeding phrase "declaring the same" with the words immediately before it, have made therewith this complete sentence, "*or any other writing of the devisor, signed in the presence of three or four witnesses, declaring the same.*" At the same time the words "will or codicil" are understood to import a will or codicil executed and perfected according to the requisitions of the foregoing section. (c)

Of the legal distinctions founded upon this construction.

In conformity to this plan of construction, as it had

(c) *Ellis v. Smith*, 1 Ves. J. 11. *Hoyle v. Clarke*, 218.

been judged a sufficient compliance with the requisitions of the *fifth clause*, if the testator *acknowledged* his signing, without *actually executing it in the presence of* the witnesses, the above reading of the *sixth section* leaves the revocation by a formal will to be governed by the preceding section, and open to the same construction.

Interpreting the language of the 6th clause upon these principles of construction, the law which arises upon it is this ; that a will or codicil, in order to revoke a former will, must be executed with the same solemnities as the original will, that is, it should be signed by the testator, or by his directions ; and subscribed by three witnesses, in his presence. And if such subsequent writing, accompanied with all the formalities requisite to a perfect will of lands, under the 5th clause, make a fresh disposition of the property, inconsistent with the dispositions thereof, by a former will, it is a plain revocation without any express declaration of intention to revoke. But if a writing, not duly attested according to the 5th section, contain an express declaration of intention to revoke, and furthermore be actually signed in the presence of three or more witnesses, such instrument is an effectual revocation, and the witnesses need not, as in the case of a substantive disposing will, under the 5th section, subscribe their names to the instrument, in the presence of the testator.

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## SECT. II.

### *Methods of Revocation.*

**WILLS** are in their essential nature revocable. A man cannot make an irrevocable will, or by any terms he can use in his will renounce the privilege of revoking. And a testator may revoke in two manners ;—by revocation express, and by revocation implied. A revocation may be said to be express, either when the testator,



by a subsequent writing signed by him in the presence of three or more witnesses, (1) declares a present intention (2) to revoke, according to the construction above considered, whereby the latter part of the 6th clause is disconnected from the words "will and codicil;" or, secondly, by a will executed with the solemnities required by the 5th section of the statute, *viz.* by the signature of the testator, and the subscription of three witnesses *in his presence*; which latter mode may, it should seem, be properly considered as an express revocation, because, if a man, after having made a will of lands, makes another will inconsistent with the former, and gives to it the form of a substantive independent instrument, he may be said to have explicitly and expressly revoked the preceding will, since he has himself declared that the will last made is his will, at the time actually present, and by consequence that it is to take place of every different disposition of an earlier date; or, thirdly, by cancelling, tearing, or obliterating such will by the testator himself, or by his direction or consent.

Under the 2nd general head may be classed all those revocations which arise by the inference of intention, which the law deduces from the collateral acts of a testator after making his will; and which are not within the reach of the statute of Frauds.

It has been shewn that, according to the prevailing opinion, if an instrument be designed as a will, and is

(1) Though, to revoke a will by an instrument of declaration according to the statute, such instrument must be signed in the presence of three witnesses, yet it has been held that it is enough if the witnesses sign: it is not necessary that they should attest the fact of the signing by the testator in their presence, for their actual subscription is adopted only for the purpose of facilitating their recollection of the circumstance. 8 Vin. Abr. tit. Devise, 142. pl. 3. And indeed it has been said there is no absolute *necessity* for the witnesses to the testator's signing to subscribe at all. Vin. Abr. tit. Dev. (R) 4. pl. 3. Townsend v. Pearce, per Eyre and Parker, J.

(2) The expression of an executory or future intention to revoke, does not operate as a revocation. Vid. *infra* 237.

not made *merely* for the purpose of revoking a former will of the same lands, it will not have that effect, unless it be completed as the statute directs with respect to a will of lands, although it be signed in the presence of three witnesses ; (e) because, being intended as a will, and to revoke as such, it cannot revoke but as a will, and by virtue of that mode which in the first part of the sixth clause is pointed out. And indeed, where a testator designs to revoke a former will by an instrument making new dispositions of his property, his intention to revoke is so coupled in appearance with his new testamentary act, that, unless he completes such testamentary act, by observing the formalities requisite to its perfection, he is not looked upon in law as manifesting a deliberate purpose of revoking.

A will, though rendered inoperative by extrinsic circumstances, may revoke a former will.

But although the doctrine seems now to be settled as it was laid down in the case of *Limbery v. Mason*, (f) viz. that if a testator designs to revoke by a new will, unless the instrument be effectual to operate as a will, it shall not amount to a revocation ; yet the words “ shall be effectual to operate as a will ” must be taken, as has been before observed, with reference only to those requisites to its validity which have been made necessary to it by the fifth clause of the statute ; since, if properly executed and attested to pass freehold lands according to the statute, though it should be prevented from operating by the incapacity of the devisee, or any other matter *dehors* (g) the will, the former will is nevertheless revoked by it. (3)

(e) *Eggleston v. Speke*, Carth. 81.

(f) Com. 454.

(g) *Roper v. Radcliffe*, in Dom. Proc. 1 Bro. P. C. 450. Vin. tit. Dev. (R. 3) pl. 2. *in notis*.

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(3) 8 Ves. J. 370. per Lord Alvanley ; et vid. *Montague v. Jeffereys Moor*, 4 Roll. Abr. 615. Thus a will devising lands in fee to the heir at law, though void as to the purposes of a will, yet operates as a revocation if attested according to the statute. Per Lord Hardwicke, in *Ellis v. Smith*, 1 Ves. J. 17.

In the case of *Onions v. Tyrer*, (h) the testator by his second will disposed of the lands to the same purposes as by the former will, though to different trustees. The first will was executed and attested according to the 5th section; the second will, though subscribed by the testator, and attested by three witnesses, was not subscribed by those witnesses in the presence of the testator: it was therefore invalid as a will of lands, but was executed agreeably to one of the modes of making a valid revocation prescribed by the 6th section of the statute. In that case, the Chancellor observed upon the circumstance of the dispositions in both instruments being the same, (4) by which it was demonstrated that the testator did not mean to revoke the dispositions of the same lands made by his first will: but his Lordship intimated that his judgment would not have been different if the same lands had been given to other persons by the second will; taking, as it is presumed, the broad ground, that a will of lands is not to be revoked by a subsequent will, unless such subsequent will is effectual as a will under the statute: for the law seems now to be well settled, that though the dispositions of the second will be ever so inconsistent with those of the first, the first will shall stand unrevoked unless the second be signed by the testator, and also subscribed by three witnesses in his presence. The same consequence still holds, though the second will contain an express revoking clause, and is also signed in the presence of three witnesses; if the revocation is considered as being made in subserviency to the disposing part of the will; which being ineffectual, as not being subscribed by the witnesses in the testator's presence, the accessory must follow the fate of the principal. But where the revoking clause has not this connexion with the disposing part of the will, as where the dispositions relate to other lands

**(h) 1 P. Wms. 342.**

**(4) See the decree containing the reasons on which it was founded, stated from the register, in Mr. Coxe's note to the case.**

without affecting the subjects of the first will, or where the second will is only of personal estate, there seems to be no reason why, if it contain an express revoking clause, and be signed by the testator in the presence of three witnesses, it should not revoke an antecedent will of lands: and such seems to have been the opinion of Lord Chancellor Cowper, in the above-mentioned case of *Onions v. Tyrer*. (5)

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SECT. III.

*Inconsistent Dispositions.*

CONCERNING the operation of a subsequent will of lands, executed with the ceremonies prescribed by the 5th section, as a revocation of a preceding will, it is material to be observed that such effect is not produced by the subsequent will, merely as being posterior in time, unless its dispositions of the property are incapable of standing with those of the preceding will: and where there is any such inconsistency, the revocation produced thereby is confined in its extent to the subjects of the inconsistent dispositions. This seems to be well established in *Hitchins v. Bassett*, (a) where the case upon the special verdict was as follows:—Sir Henry Killigrew was seised in fee of the lands in question; and on the 12th of November, 1644, made his will in writing, whereby, amongst other hereditaments, he devised the premises to Mrs. Jane Berkely, his near

(a) 1 Show. 265. 2 Salk. 591.

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(5) See the same doctrine and reasonings applied to the question of revocation upon the statute of 12 Car. II. c. 24. 7 Ves. 48. *ex parte Ilchester*.

kinswoman, for life, with remainder over to Henry Killigrew, testator's natural son, in tail, and made the said Mrs. Berkely sole executrix. They further found that afterwards, in 1645, the testator made another will in writing: but what was contained in the last-mentioned will, or what was its purport and effect, the jurors were ignorant. The argument for the heir at law, and in support of the last will as a total revocation of the first, rested mainly upon the construction of the maxim, that a man could not die with two wills; which the counsel on that side interpreted to mean, that if a man, after having made a will of lands, makes and executes another will, calling it his last will and testament, and giving it the form and language of a substantive independent will, it must necessarily be a total revocation of the preceding will. It was admitted that a man might make several wills of particular subjects: but then they ought to be confined in expression to those particular subjects; for however different the subjects, yet if the subsequent will was published generally as a man's *last will and testament*, it must be held to be a revocation of the former will. It was also true that a testator might make as many codicils as he pleased: but there was a wide difference between wills and codicils,—a codicil being an accessory to a will, and not destructive, but confirmatory thereof. It was observed also, on the same side, that where a man makes several wills expressly of different particular things, these together make but one will, though written upon different papers: but that, as the jury had found that the testator had made another will, this must be taken to mean a general testament. And it must be understood to mean a different will; for if it had been a duplicate, to be sure it would not be a revocation: but then it ought to be *idem*, and not *aliud testamentum*. And upon the whole they concluded, that if the testator did in fact make a second will, not correspondent *in omnibus* with the first, and purporting to be his *last*

*will and testament*, it was necessarily a total revocation. (1)

These arguments were answered on the other side by denying the construction put upon the civil law maxim, 'that a man can die with but one will.' They said, that the true construction of that maxim was, that where two devises of the same thing were made, the last must stand: but that two wills might well stand together as to such devises or bequests as are not inconsistent. That there was no ground for presuming that the last will in this case, though a complete will, contained any thing inconsistent with the devise in the first will, under which the lessor of the plaintiff claimed. The Court (in Trinity term, 4 W. and M.) gave judgment for the plaintiff; and a writ of error being afterwards brought in Parliament, that judgment was affirmed. And, since this case, the point appears to have been considered as settled, that a second substantive independent will, properly executed, as a will of lands, is not, merely as such, a total revocation of a former will, but only so far as it is inconsistent with it; though it must be owned that Sir Matthew Hale, when he sat as Chief Baron in the Exchequer, seemed to be of opinion on the same case, (b) that such subsequent independent will, though not importing in express terms a revocation of the former, nor passing any land, would amount in construction of law to a revocation. (2)

(b) *Seymour et Ux. v. Rosworthy.* Hard. 370.

(1) The same line of argument was taken and pursued by the late Mr. Serjeant Hill in arguing the case of *Goodright v. Harwood*, Cowp. 89.

(2) In arguing the case of *Hitchins v. Bassett*, it would seem as if Serjeant Maynard meant to concede that where the second will appears to have appointed an executor, it might be considered as that sort of distinct, substantive, independent will, which must revoke a former will *in toto*: but no authority is found for such a concession; and it is conceived that the law is at this time clearly held otherwise.



That great Judge, it is true, expressed himself in favour of the first will : but then it was on the ground of there being no finding by the jury of the contents of the second will, so that it did not appear but that the second will was a *confirmation* of the first.

The rule, however, is now established, that the contents of such second will must be found, and the contents so found must appear to be inconsistent with the dispositions of the former will, to operate as a revocation ; and that if part is inconsistent, and part is consistent, the first will shall only be revoked *pro tanto*, and to the extent of these discordant dispositions.

The case of *Hitchins v. Bassett* received confirmation from the subsequent case of *Goodright v. Harwood*, (c) which passed through three stages of adjudication. The jury found by their special verdict that J. Lacy made two wills, both duly attested so as to pass freehold estates ; and that the disposition made by the second will, which was eight years after the first, was different from the disposition in the prior will : but in what particulars was unknown to the jurors ; and the jurors did not find that the testator cancelled the first will, or that the defendant destroyed the second. It was contended for the defendant in the writ of error, that the grounds of the decision in *Hitchins v. Bassett* were in his favour ; for that that case was decided against the effect of the second will as a revocation of the first, because there was no proof whatever of any change of intention in the testator, or even that the second will did any way affect or concern the testator's

(c) 3 Wils. 497. Cowp. 87. 7 Bro. P. C. 344.

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It was holden, before the statute of Frauds, that if a man made his will, and devised his land to J. S., and afterwards purchased the manor of D., and afterwards wrote in his will that J. D. should be his executor, this was no new publication to make the lands pass. Vin. tit. Devise (z) S per Popham, C. J. And the principle in this respect must be the same as to republication and revocation.

lands : but that, in the present case, it was found that the second will was attested by three witnesses that it did relate to lands, and indeed to the very estate in question, because the testator had no other real estate ; and that, as it had been expressly found that the disposition in 1756 was different from the disposition in 1748, that finding amounted to a finding of an express revocation of the first will.

But Lord Mansfield, after stating the rule that a subsequent devise of land must be inconsistent with a prior devise of the same land, or the first will would stand as a good subsisting devise, observed that it was not found that the second will was in any particular repugnant to or inconsistent with the first. Had the defendant destroyed the second will, there might have been good ground to presume such inconsistency or repugnance ; and the jury might have found the fact of revocation. His Lordship added, that there was no variation in substance between this case and that of *Hitchins v. Bassett*. That, properly speaking, *another* will could not exist without there being a difference ; for if it were exactly the same, it would be no more than a duplicate or republication of the first will. That the jury, therefore, in finding it to be another will, said, *ex vi termini*, that it was different : but, as they had not found in what that difference consisted, the Court could not presume that there was any inconsistency in the dispositions of the two wills, and by consequence they could not say that the first will was revoked.

This doctrine is in itself so rational, and so founded on authorities, that one is surprised at seeing the question renewed, and again disputed at so late a period : but even these cases did not prevent the point from coming again into discussion, with a trifling variation in the circumstances, a few years ago, in the case of *Thomas v. Evans* ; (d) in which a person made his

(d) 2 East. 488.

will, whereby he bequeathed his personal estate to his mother, and, after several intermediate limitations, devised the ultimate remainder to T. Upon his having afterwards acquired other estates, some by purchase and some by devise, and the bequest to his mother having lapsed by her death, the testator made a second will disposing by name of the property which had been so devised to him; and then added, "as to the rest of my real and personal estate I intend to dispose of it by a codicil hereafter to be made to this my will" This was determined to be no revocation of the former will. It was not necessary to suppose the words intimating the future intention to be meant to embrace the real property before devised, as the testator had acquired estates since the first will, which were not included in the second, and which might satisfy the words by which the future intention was expressed: but, admitting these words to include the real property devised by the will, still it did not appear that the disposition intended to be made of it would be *inconsistent* with the former devise. And even supposing it to be intended to be inconsistent, yet an express *intention* to revoke would not operate as an actual revocation; for, as was truly observed at the bar and on the bench, what would not have been a revocation by parol before the statute would not be so since, though reduced into writing with all the formalities of the statute; and it had been decided that a bare intention to revoke, though expressed by parol, was no revocation before the statute, unless the testator declared that he did revoke his will. (3)

Express intention to revoke no actual revocation.

*Handwritten note:*  
"I think it does not make a revocation."

(3) *Cranvel v. Saunders*, Cro. Jac. 497.; where it was resolved by the Court, that if a man makes his will, in writing, of land, and afterwards upon communication says, that "he has made his will, but it shall not stand, or "I will alter my will," these words are not any revocation of the will, being in a future sense, and only a declaration of what he *intends* to do. *Aliter*, if he says I do revoke it, or in any other manner declares his purpose to revoke it *in presenti*. But if a testator declare his intention by parol to revoke his will, and that

*Handwritten note:*  
"I think it does not make a revocation."

Inconsistency  
between the  
will and sub-  
sequent acts.

As a second will is no revocation of the first, any further than as it is inconsistent therewith; so neither does a testator, by acting in any other manner upon the property which he has already devised by his will, revoke the will by such act beyond the extent of that necessary inference which is created by the inconsistency between the will and his subsequent conduct. Thus, in an early case, (e) where a man, having issue two sons by several venters, devised his lands to F. his eldest son, in tail male, remainder to the heirs male of W. his younger son, and for default of issue to his own right heirs; and afterwards made a lease to W. for thirty years, to begin after his the testator's death, and died: it was resolved that this lease made to W. was not a revocation of the whole devise, but *quoad* the term only. And the same point was agreed to on the bench and at the bar, in *Montague v. Jeffreys*. (f) But this doctrine was carried to its fullest extent in the case of *Lamb v. Parker*. (g) There Edward Parker by his will devised to his younger son W. Parker a messuage for ninety-nine years, if three lives therein mentioned lived so long, yielding and paying an annuity of fifty pounds to his sister, who was the plaintiff, for her life. The testator afterwards demised the same messuage to one L. for ninety-nine years, if three lives, named in such demise, should so long live, yielding and paying fifty pounds per annum to the testator, his heirs and assigns. The question was whether this demise to L. was a revocation of the devise to W.; and, consequently, of the annuity payable to the plaintiff.

The cause was first heard at the Rolls, and then held to be a revocation: but, upon appeal to the Lord

(e) Cro. Car. 23. *Hodgkinson v. Wood*, Ann. prim. Car. Reg.

(f) Vin. tit. Dev. u.

(g) 2 Vern. 495.

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upon his arriving at such a place he will execute his intention, and in his going thither he is murdered, it has been said that the intended revocation shall take place. 1 Roll. Abr. 614. 7 Ves. J. 371.

Keeper, (h) the contrary was adjudged, and upon the following grounds:—That by the lease to L. the term of ninety-nine years commenced immediately in the lifetime of the testator; whereas the term to W. was to commence from the testator's death: and though both were determinable for three lives, and possibly L.'s three lives might happen to live the longest, yet that a reversionary interest passed which would carry the rent reserved on L.'s lease.

The ground of this species of revocation is, as is above observed, the inconsistency of the posterior act, and the inference of intention arising from such inconsistency: proceeding, therefore, upon this principle, a lease made subsequent to the will of the devised land, for the benefit of the same person to whom the fee had been devised, and to commence upon the decease of the testator, was in *Coke v. Bullock* (i) adjudged a revocation *in toto*. Had it been to a stranger, it was agreed it would only have been *pro tanto*. (4) And it was likewise agreed that if the lease had been granted to begin presently, or futurely in the lifetime of the devisor, it would have been no revocation, for then it might have stood with the will.

Grant of a less interest than was given by the will, to the same person.

To a stranger.

With a different commencement.

Upon this distinction in respect to the time of the commencement, the case of *Baxter v. Dyer*, (k) determined by the present Chancellor, is in accordance with the last-mentioned case of *Coke v. Bullock*. In *Baxter v. Dyer*, the testatrix, after devising lands to Sir John Dyer and his heirs, borrowed from the devisee a sum

(h) Sir Martin Wright.

(i). Cro. Jac. 42.

(k) 5 Ves. J. 656.

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(4) A distinction was here adverted to by Walmsley, J. which is clearly not law, as the law is now settled, viz. that though in the case of a lease to a stranger after a will made, such lease, if it comprehend part only of the same lands, is only a revocation for such part; yet if it embrace the entire lands, though it is partial only in respect to the estate, it is a *total* revocation, as extending specifically over the whole subject matter.

of money, and mortgaged the devised estate to him, by a conveyance in fee; and, upon the ground that mortgages are in equity considered not as conveyances of the estate, but as mere pledges thereof by way of security, this subsequent mortgage, *although it was made to the same person to whom the estate itself had been devised*, was held to be no revocation. As in *Coke v. Bullock* the lease was to begin in the lifetime of the testator, and might have terminated before his death; so, in this case, the pledge was to take place in the testatrix's lifetime, while it was her's, and at her own disposal; and the object might have been answered in her lifetime. It was, therefore, held to be no revocation: and the Chancellor, after stating that the case of *Harkness v. Bayley* (1) had been misreported, produced a note which he himself had made of it, wherein a feature of inconsistency between the will and the posterior acts of the parties appeared; by attending to which the principle of that case might be reconciled with his decision of the case before him; for it appeared that after the mother's devise in fee to the daughter, the son joined the mother in a conveyance of the estate for five hundred years to the daughter, with a proviso that if the mother or son should pay during the life of the mother 100*l.* a year to the daughter, and the son after the mother's death should pay 4000*l.* to his sister, then the term should cease and be void; and the son moreover covenanted with the sister to pay 4000*l.* to his sister after the mother's death, and also with the mother to pay the annual 100*l.* to his sister during the mother's life. This conveyance was clearly inconsistent with the devise; and it was also clear that the mother intended the estate to descend to the son.

The settled law, therefore, upon these cases is, that a will is not to be revoked but by necessary implication; so that where the subsequent will or posterior act is consistent with a prior will, or with any part of it, such

(1) *Prec. in Chan.* 514.

prior will remains valid in part or in all, according to the extent to which the dispositions of the party can be effectuated without contradiction or discordancy. But where two inconsistent wills are produced of the same date, or both without date, neither of which can be proved to be last executed, they are both necessarily, and by the common law, void for uncertainty so far as they are inconsistent; and, supposing no act of the testator subsequent to the wills to have explained and reconciled them, the heir at law (*m*) is let in. Though, according to the case last cited in the margin, either will is subject to be confirmed by a subsequent act or declaration of the testator. Which judgment appears to stand on a very reasonable and intelligible principle: since a will cannot be said to be revoked by a will till the death of the testator. And the act of the testator only operates to decide which is his *last* will; and not to produce the effect of an implied or parol republication, of which, since the statute of Frauds, there is authority and reason for doubting the possibility, as will be shewn in its proper place.

Where there are two inconsistent wills of the same date, they are both void for uncertainty.

*Not till Death*

#### SECT. IV.

#### *Imperfect Acts and Instruments.*

IT is manifest that these cases of inconsistent wills turn principally upon the indications of intention: but we must observe that a will perfected as the statute requires is not subject to be overturned by loose and conjectural inferences of an alteration of mind in the testator. The cases have reduced the doctrine to a regular system. The statute itself has limited the mode whereby a will may be expressly revoked: and one of the modes prescribed by the statute is by a subsequent will; which, we have seen, should, to produce that effect

(*m*) 5 Bro. P. C. 57. *Phipps v. Earl of Anglesea*, 7 Bac. Ab. 327.



according to the force given by construction to the word "will," where it occurs in the 6th Section, be perfected with the formalities required by the preceding Section. But this construction of the language of the 6th section seems to have given to it no enabling efficacy, in respect to the operation of a will; since, if the words "will or codicil" had not been excepted out of the restraint put upon the power of revoking, it should seem that the statute must either have been construed not to extend to the case of a subsequent will; or to have enacted that a will once perfected, though made twenty years before the testator's death, must be taken as his last will, if remaining uncanceled, notwithstanding a subsequent will should be made within a month before the decease of the testator, with all the circumstances constituting a perfect will.

No intention  
can be inferred  
from a will of  
lands not exe-  
cuted accord-  
ing to the sta-  
tute.

As the law now stands, it has been shewn that a new substantive will, unless it be executed as the 5th Section directs, will not revoke a former will; which rule seems to arise justly out of the principle of intention; for an intention to revoke a first will by a second can only be properly inferred from a legal, valid, and perfect disposition of the same property; which accords with the rule of the civil law, "*Tunc prius testamentum rumpitur cum posterius perfectum est.* (1)" In truth, since the statute of Frauds, there can be no will in contemplation of law that has not been executed with the formalities made necessary by that statute. It is a mere nullity, (2) affording no ground of inconsist-

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(1) See the case of the Earl of Ilchester, 7 Ves. J. 348. that a testamentary appointment of a guardian, by virtue of the 12th Ch. 2. c. 24. is not revoked by a subsequent testamentary appointment; which is not substantively perfected by the attestation of two witnesses, according to that statute.

(2) Equally so in all courts. Thus in equity, a will of lands, unattested according to the statute, and containing a bequest of personalty to the heir, will not put him to his election; which is a striking instance to shew the absolute nullity of such a devise in the view of the courts of equity.



ency from which to infer even a change of intention. But in general an instrumental act of a testator, inconsistent with the dispositions of his prior will, even though such act may be rendered inoperative by the want of certain legal requisites to its validity, will effect a revocation. For though, in the case of a subsequent *will*, the courts will not take any notice of its existence as to any devise of land, if not duly executed and attested; yet, in the other cases of invalid instrumental acts, they are respected as indications of intention, though specifically inoperative. And, indeed, if a will devising land be executed and attested so as to have an existence as a will, though from circumstances extrinsic it be rendered void, it may still effect a revocation; as in the case before-mentioned of a will devising land in fee to the heir at law. (a)

But other legal acts, though instrumentally inoperative, may nevertheless revoke a will.

And if a will be properly executed, though by circumstances extrinsic, it is prevented from operating, it may nevertheless revoke a prior will.

If a testator leaves at his death a dozen wills, and only one executed and attested so as to pass real estate, such will, whatever may be its date, is properly his *last* will as to this part of his property. And as a man can have no will but his *last* will, there can be no other *will* from which any intention of the testator, inconsistent with the dispositions of his operative will, can be inferred: (3) but if a testator affects to do something instrumentally, which fails from the omission of some circumstances with which it ought to be accompanied, and which, if effectuated, would by its specific operation revoke a prior will, the courts will take notice of such imperfect instrument, and construe it a revocation as much as if it had been rendered effectual to its purpose. For it will not be supposed that a nugatory act was intended to be done, when that act was professedly to have immediate perfection: whereas in the case of an unexecuted will, which is made in prospect of death,

(a) Vid. *Ellis v. Smith*, 1 Ves. J. 17. and note (3) in page 6.

(3) This is strongly put by Sir W. Grant in giving his opinion in the case *Ex parte Ilchester*. "It is not competent for a person to express an intention, as to land, by such an instrument. 7 Ves. J. 378.

and with regard to a future condition of things, it is reasonable to suppose it to be left purposely unfinished and inoperative, to be adopted or not on the approach of extremities, as the state of the testator's affairs and connections may at that season determine his inclinations.

Imperfect instruments of conveyance.

Upon the above-mentioned principles, the imperfect conveyances by a deed of feoffment without livery of seisin, and by a deed of bargain and sale of the freehold without such enrolment as is required by the statute in that case provided, (b) though specifically inoperative, are nevertheless effectual revocations. So, before the statute taking away attornment, a grant of a reversion without attornment was a revocation of an antecedent will devising the same property. (4)

Power of appointment ill executed.

Whether a deed intended to operate as an appointment of uses, but incapable of operating as a valid appointment, either from a deficiency of power in the party executing the deed, or a neglect of some ceremony made necessary to the efficacy of the appointment by the person granting the power, can be operative as a revocation, seems to be left, by the case of *Shove v. Pincke*, (c) in a considerable degree of uncertainty. If we look to the judgment and certificate, (d) it is plain that this point cannot be considered as judicially decided by this case. Lord Kenyon indeed observed, that even supposing the appointment made in that case to be an inadequate conveyance for the purpose for which it was intended; still, if it demonstrated an intention to revoke

(b) 1 Roll. Abr. 615. Vin. Dev. (P) pl. 6. Went. Off. Ex. 22. 3 Ark. 803.

(c) 5 T. R. 124.

(d) 5 T. R. 310.

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(4) Went. Off. Ex. 22. So where a tenant to the præcipe is made towards suffering a recovery, and no other proceedings are had, a previous will is nevertheless revoked. Vid. *Harmood v. Oglander*, 6 Ves. J. 199.

the will, it amounted in law to a revocation (5) He added, that if it were necessary to decide the point, he did not see why it might not operate as a grant of the reversion. But although the late Chief Justice seemed clearly to be of opinion, that a void appointment would have the effect of revoking a prior disposition by will of the same property, such effect was not, as far as appears by the report, at all adverted to by the other judges; and in the certificate mention was only made of the operation of the deed as a grant of the reversion, or as a covenant to stand seised to uses (6).

The failure of the appointment in the case of *Shove v. Pincke* arose from the defect of a power to make it, the power originally reserved having been exercised without a fresh reservation: (7) but there does not appear to be any sound distinction between such a case and one wherein the failure happens by reason of an omission of any ceremony, made necessary by the person creating the power, to its valid execution. Supposing the revocation to be produced by inference of intention, it is plain that the attempt, whether the failure arise from one cause or the other, affords an equal inference of intention. (8)

It has been long a settled point, that a grant made to a person incapable of taking under it may nevertheless

Of grants to persons under disabilities.

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(5) In the cases of feoffment without livery, and bargain and sale without enrolment, the instrument itself is complete; and there is no intrinsic defect in it, but something subsequent is wanting to its specific operation. Between these cases therefore, and that of an appointment informally executed, or without authority, there is a difference; the informality in this latter case being in the instrument itself.

(6) See the observations made upon this case by Lord Alvanley, in the important case of the Earl of Ilchester, 7 Ves. J. 374.

(7) For this point see the leading case of *Heli v. Bond*, 1 Eq. Ca. Abr. 342.

(8) The instrument endeavoured to be set up in *Clymer v. Littler*, 3 Burr. 1244. had no definite legal character, or specific tendency, and was therefore insufficient to ground any inference of intention; besides that it laboured under a suspicion of forgery.

operate as a revocation of a will. Thus, where a man, (e) after having made his will in November, 1739, and thereby given all his real and personal estate to his brother, by a deed poll made in November, 1740, gave and granted to his wife all his substance which he then had, or thereafter might have, it was decreed that the grant was void, because the law would not permit a man to make a grant or conveyance to his wife in his life-time ; neither would a court of equity suffer a wife to take the whole of a husband's estate beneficially, in his lifetime ; for it could not be in the nature of a provision, when it comprehended all the husband was entitled to. Yet as being an act inconsistent with and repugnant to the will, though not strictly legal, it amounted to a revocation. It produced, therefore, an intestacy as to the legacies : and though the appointment of the brother as executor remained unrevoked, yet the revocation of the legacies given to him made him as to them a trustee in equity for the next of kin.

In the same manner a subsequent devise to a person incapable of taking under it is a revocation of a prior will ; as was determined in the case of *Roper v. Radcliffe*, (f) in the House of Lords, where lands were given, by the second will, to a papist. And the same effect has been adjudged to wills devising an estate to the poor of the parish, (g) or to a corporation. (h)

But in these cases of invalid instruments it does not seem to be so correct a construction of their operation, to ascribe their revoking efficacy to the indication they afford of an *intention to revoke*, as to the indication they afford of an intention to do that which by a posi-

(e) 3 Atk. 72. *Beard v. Beard*.

(f) In Dom. Proc. 1 Bro. P. C. 450. 10 Mod. 233. 2 Abr. Eq. Ca. 771.

(g) *Frenche's case*, cited in *Montague's case*, Vin. tit. Dev. (O) 4. and 10 Mod. 94.

(h) Vin. tit. Dev. (O) 5.

tive rule of law is an act of revocation. (9) For unless the act if done so as to be effectual to its purpose would have the effect of revoking, an ineffectual attempt to do the act could not produce such a consequence ; and, as it will appear hereafter, this effect of these acts themselves, when executed completely, cannot, for the most part, be satisfactorily explained on the principle of intention.

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#### SECT. V.

##### *Acts procured to be done by Fraud or Compulsion.*

WHERE a deed is void as being covenously made, it seems clearly held to be incapable of operating as a revocation, for it is a complete nullity. And, in a court of equity, a deed obtained by fraud or by compulsion has, in a case before Lord Thurlow, been held equally inoperative against a subsisting will. His Lordship observed, that the reason against admitting such an instrument to have the effect of a revocation was strong in that court, since when application is made by the proper party it will be ordered to be delivered up ; and where a deed is ordered to be delivered up, it is implicitly declared to be *no deed* (1)

The case just cited of *Hawes v. Wyatt* was first de-

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(9) Lord Hardwicke expresses this opinion in the case of *Hick v. Mors*, Ambl. 216. and *Abney v. Miller*, 2 Atk. 598. and again more pointedly in *Sparrow v. Hardcastle*, of which the reader will find an accurate note in 7 T. R. 416. where his Lordship says that "these imperfect conveyances are revocations, because they import an intention of altering the condition of the estate."

(1) See the case of *Hawes v. Wyatt*, 3 Bro. C. C. 156. It seems also to be held in this court that a deed executed by mistake is no revocation of a will. Vid. 6 Ves. J. 215. and see post, tit. '*Mistake.*'

cided by the late Lord Alvanley, when Master of the Rolls, in favour of the revoking effect of the deed; and his decision was reversed, upon appeal, by the late Lord Chancellor Thurlow. It appears, however, that Lord Alvanley, when, as Lord Chief Justice of the Common Pleas, he sat with the Chancellor in the case *ex parte Ilchester*, (a) remained of his original opinion. (b) He observed, that in that case the son, who was the testator, after the conveyance to his father, went abroad; that during his life he never intimated any intention to quarrel with it; that the bill was filed to set it aside upon such an exertion of parental authority, as, that that court would not permit an instrument so framed to stand. His Lordship allowed that the deed could not operate against the heirs of the son; yet "he was of opinion it would revoke the will, for the son thought it was actually revoked, and that therefore to permit it to stand would be against principle; that though Lord Thurlow differed from him, he believed *Hick v. Mors* (c) was not adverted to, but that there was the authority of Lord Hardwicke that such an instrument was sufficient to revoke a will."

It does not however, in the only report of the case of *Hick v. Mors*, distinctly appear that any fraudulent means were taken to induce the testator to execute the revoking instrument. The words of the reporter are, "he was prevailed upon;" and to be sure the facts of the case induce a suspicion of improper influence. No fraudulent arts or undue influence, however, are stated to have been used; nor are any such distinctly alluded to by Lord Hardwicke, who refers the case to that class of cases above considered, where imperfect conveyances, have been held to revoke antecedent wills. Stripped of any colouring of fraud, the case was simply this: A testator covenanted by indenture to levy a fine, and in the deed specified the use of the future fine to be to H.

(a) 7 Ves. J. 348.

(b) *Ibid.* 374.(c) *Amb.* 216.

for 1000 years, which fine was accordingly levied. He afterwards made his will, properly attested, and devised the fee of the same premises to H., and in the year following executed a fresh covenant by indenture, reciting the first, declaring a new and different use of the fine, viz. to H. in fee; and whether by this the will was revoked was the question. We may ask, however, whether the second indenture of covenant was good as to the new use of the fine, since if a precedent indenture be made to direct the uses of an assurance, and the assurance follows, the Touchstone says, that the donor or recoverer cannot by any act of his, subsequent to such assurance, change or avoid the prior use. (d) The second indenture might, therefore, have been regarded as inoperative; and was probably attacked on that ground, for that seems to have been the view in which it presented itself to the Court.

It is, to be sure, somewhat difficult to apprehend how a deed which is void, either as being fraudulently, surreptitiously, or coercively obtained, and so not moving from the will, or speaking the real sense of the party, should yet revoke a previous act deliberately and formally done. Where a part only of a deed is liable to the imputation of fraud, there may be good reason for holding the other uncorrupted part a revocation of a prior testamentary disposition, as far as it is inconsistent with it. But the understanding does certainly struggle against giving to an act admitted to be invalid against the person performing it, on account of the fraud or compulsion accompanying it, an operation destructive of a prior act, voluntarily and considerately performed. It is true however that, in giving his opinion in the case last mentioned, Lord Hardwicke observed, that it was not like the case of a conveyance by covin, which would make it not the testator's deed *at law*; and which, his Lordship said, would be a *nullity*. There is, to be sure, a difference between the case of a deed void at law for

(d) Vid. Touchst. Ch. on Uses, sect. 5.



covin to which *Non est factum* may be pleaded, and that of a deed liable to be set aside by cancelling or directing a reconveyance, on account of the fraud or compulsion used in obtaining it. But it seems reasonable for a court of equity to act upon its own maxims, in analogy to the rules of law ; and if that which in that court is treated as deserving of being frustrated and rescinded, on account of the turpitude of the intent and contrivance, were, nevertheless, to be considered as capable of the collateral effect of revoking a will, this, as it seems, would scarcely be reconcileable with the rule of *equitas sequitur legem*.

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#### SECT. VI.

##### *Cancelling.*

Cancelling an equivocal act.

Among the methods whereby a will may be revoked is that of the destruction of the instrument itself by burning, cancelling, tearing, or obliterating, the same by the testator himself, or in his presence, and by his direction and consent ; which methods of revocation are excepted expressly out of the statute of Frauds. But we are to observe that it has been always an established point, both before and since that statute, that the act of cancelling or destroying a will is in itself an equivocal act, and that its operation as a revocation depends upon the intent with which it was done ; which must be made to appear : for if a man were to throw ink upon his will instead of sand, though it were a complete defacing or obliterating of the will, it would not be a revocation ; or if a testator, designing to cancel his former will, were accidentally to cancel one subsequently made and meant to be his last will, such an act would clearly be no revocation. In these cases the in-



tention must govern. In *Onyons v. Tyrer*, (a) where a testator canceled his first will, and by a subsequent will, not properly executed, being neglected to be subscribed by the three witnesses in the testator's presence, set up a devise contained in the first will, the first will, as to such devise, was held to be unrevoked; notwithstanding the testator in his second will expressly revoked his first, which revocation was, in other respects, effectual as a declaration in writing within the statute. For it was plain he did not mean to revoke his first will, as to the particular lands devised by it, unless he might, at the same time that he revoked the first, set up the like devise by the second will. And if by the latter will the premises had been given to a *third person*, it should never, said the Court, have let in the heir; since the meaning of such second will would still be to give to the second devisee what it had taken from the first, without any consideration had to the heir: and if the second devisee took nothing, the first could have lost nothing.

It was plain that the testator did not mean to revoke the former will by cancelling simply, as a self-subsisting independent act; but by substituting at the same time another perfect will in its place, and not otherwise; and therefore the cancelling was but a circumstance, shewing that he thought he had made another good disposition by the second will. The effect of such cancelling depended upon the validity of the second will, and ought to be taken as one act, done at the same time; so that if the second will was not valid, as the testator thought it was, and without which he would not have cancelled the first, the cancelling of the first will being dependent thereon, ought to be looked upon as null and inoperative also. In a word, it was relievable in equity, under the head of accident or mistake.

*Hyde v. Hyde* (b) is also a case which shews that the

If a testator makes a second will, and in terms revokes the first, but it appears that the revocation of the first will was only to give effect to the second, the second will is no revocation, if ineffectual for want of the proper attestation.

*I think  
as to this*

*But this  
is different  
from a man  
who has not  
intentionally  
cancelled his  
former will*

(a) 2 Vern. 743. 1 P. Wms. 345. Prec. in Ch. 459.

(b) 1 Eq. C. Abr. 409.

cancelling (1) or tearing of a will must be done *animo revocandi*, to have the effect in law of destroying the validity of the will. The case was briefly as follows:—

A man made his will in writing, and thereby devised all his real and personal estate to his wife, her heirs and executors, in trust, to pay his debts and legacies; and then devised several legacies to his children and other persons, and concluded thus:—"In witness whereof I have to this my last will and testament, containing nine sheets of paper, and to a duplicate thereof, to be left in the hands of A., set my seal to every sheet thereof; and to the last of the said sheets my hand and seal;" which will was properly executed according to the statute.

The testator being afterwards desirous of adding other trustees to his wife, and to make some alterations in his will, sent for a scrivener, and gave directions to prepare a draught of instructions for another will, which the scrivener did accordingly, and the testator read it over and approved of it, and set his hand to it; and, thinking he had now made a new will, he pulled out of his pocket his first will, and tore off the seals from the first eight sheets, which the scrivener seeing, asked him what he was doing? "Why," says he, "I am cancelling my first will." "Pray," says the scrivener, "hold your hand; the other will is not perfected: it will not pass your real estate, for want of being executed pursuant to the statute of Frauds and Perjuries." To which the testator replied: "I am sorry for that;" and immediately desisted from tearing off any more of the seals; and soon afterwards died

(1) It is obvious that the word 'cancelling' is used here only to signify the manual operation of tearing or destroying the instrument itself, and not the virtual effect of destroying its validity; and in this sense only is it used in the clause of the statute of Charles, where its effect of revoking a will is excepted out of the restriction thereby created. But when the cases speak, as they sometimes do, of the *animus cancellandi*, it is manifest that they use the word as importing the same as *revocandi*, and not merely as the sign or mode of revocation.

Here he  
thought  
he had made  
another will

without having done any thing further to perfect the second will, or to cancel the first. After his death, on application to the spiritual court by the wife, who was made executrix to the second will, it was sentenced to be a good will as to the personal estate, and she was admitted to prove it.

On a bill brought by the legatees against the wife, and other trustees, to have a specific performance of the trust in the first will, and that the estate might be sold pursuant to the directions of that will, it was insisted that the first will was revoked either by making the second, or by tearing off the seals from the first; but the Lord Chancellor held, that the subsequent will could be no revocation as to the real estate, not being executed according to the statute of Frauds; and that as to tearing off the seals from the first eight sheets, that not being done *animo cancellandi*, was no revocation; but because the spiritual court had sentenced the second will to be a good will of the personal estate, his Lordship also held it good to that extent, and that such legatees of personalty in the first will as are left out in the second, must lose their legacies; but as to such as had legacies by the first will charged on the real estate, if the same legacies were devised them by the second will, that they should continue chargeable on the real estate; provided such legacies were not increased or enlarged by the second will; for though the second will was not sufficient in itself to charge the real estate, yet since the real estate remained well devised by the first will, they should be still secured by that real estate; for they were not devised out of land like a rent, but only secured by land, which before was well devised; but as to the new absolute personal legacies devised by the last will, they should be chargeable only on the personal estate; and should have the preference in being first paid out of the personal estate, before the other legacies in the first will charged upon the real estate, because they had several funds out of which they might be paid—the personal legacies in the last will out of the

personal estate, which was well devised by that will ; and the legacies charged or secured upon the real estate, which was devised by the first will, out of the real estate.

In a late case in the Court of K. B. the facts were as follow. C. P. made his will, duly executed to pass real property ; and having had a quarrel with a person whom he had named a devisee therein, in a fit of passion took the same out of his desk, and said to a by-stander, "you shall see whether I have done any thing for the rascal or not. I have made him a gentleman." He then began to tear the will through, when a person near laid hold of his arms, and entreated him to abate his passion. The devisee, then, who was present, prayed him to consider his family, and to pardon what he had said to offend him ; ~~upon~~ which the testator became calm ; and his arms being loosed he folded up the will, and put it in his pocket, and afterwards pulled it out again, and said "It is a good job it is no worse ;" and after fitting the pieces together, added, "There is nothing ripped that will be any signification to it." The will was found after the death of the testator in four parts ; and ejectment being brought by the heir at law to recover the devised property against those who claimed under the will, the jury found a verdict for the defendants, and established the will ; which verdict was approved by the Court on a motion for a new trial, on the ground that the act of cancellation was not completed, and that the purpose of the testator to cancel his will was changed before such intention had been completely executed ; for it was the intention of the testator to do something more if he had not been stopped, in order to carry his purpose into effect. The Court agreed, however, that if the cancellation had been once completed, nothing that took place afterwards could have set up the will. (b)

Parol evidence is admissible to shew the intention.

The cases moreover shew that the effect of the mere mechanical act of tearing may be over-ruled, and made

(b) Doe on dem. of S. Perkes v. E. Perkes and Others. 3 Barnw. and Ald. 489.

to yield to the inference of an intention not to revoke arising from other circumstances. Parol evidence of the facts accompanying the act of cancelling is admissible for the purpose of explanation. And on the same principle in a case where the intended cancelling or destruction of the instrument has been prevented by fraud or contrivance, affirmative proof of the *animus revocandi* would, doubtless, be received, and effect given to such intention if established. Even if such intention, so endeavoured to be defeated by fraud, were manifested by *no act* of the testator, it would be consonant to the general maxims of courts of equity through the medium of a trust to give effect to the intention, and to treat as perfected that which would have been perfected but for the fraud. So the slightest act of tearing, or an incipient burning amounting only to scorching, will satisfy the statute, where the intention to revoke can be manifested by proof of accompanying acts, or even declarations: but, without proof of fraud, or partially executed intention, it will not be enough to shew a design to cancel, unaccomplished through mistake or accident; such a latitude would frustrate the caution of the Legislature in the provisions of the statute of Frauds.

The case of *Bibb v. Thomas* (c) helps to shew the boundary in respect to the admissibility of this evidence. A testator, who had for two months together frequently declared himself discontented with his will, being one day in bed near the fire, ordered M. W., who attended him, to fetch his will, which she did, and delivered it to him, it being then whole, only somewhat erased. He opened it, looked at it, then gave it a slight rip (2) with his hands, rumbled it together, and threw it on the fire;

(c) 2 Bl. Rep. 1043.

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(2) Tearing is a sufficient revocation within the statute without cancelling by tearing off the seal, if the act be accompanied by any circumstance demonstrative of the intent to revoke. See *Bibb on dem. of Mole v. Thomas*, Blackst. Rep. 1043.

but it fell off. M. W. took it up, and put it into her pocket. The testator did not see her take it up, but seemed to have some suspicion of it; as he asked her what she was at, to which she made little or no answer. The testator afterwards said that that should not be his will, and bid her destroy it; to which she replied, "So I will, when you have made another;" but afterwards, upon repeated enquiries, she said she had destroyed it.

The testator afterwards told another person that he had destroyed his will; that he should make no other until he had seen his brother J. M.; and desired the person to tell his brother so, and that he wanted to see him. He afterwards wrote to his brother, saying, "I have destroyed the will which I made; for upon serious consideration I was not easy in my mind about the will;" and desired him to come down, saying, "If I die intestate, it will cause uneasiness." The testator however died without making another will. The Jury, with the concurrence of the Judge, thought this a sufficient revocation of the will; in which opinion Lord Chief Justice De Grey and the whole court, upon a motion for a new trial, concurred; the Chief Justice observing, that this case fell within two of the specific acts described by the statute of Frauds;—it was both a burning and a tearing; and that throwing the will on the fire with an intent to burn it, though it was very slightly singed only and fell off, was sufficient within the statute.

A cancelled will is not necessarily revived by the destruction of a substituted will.

It has been observed in a former part of this treatise, in commenting upon the case of *Onyons v. Tyrer*, that the cancelling is an act not necessarily operating as the revocation of a will. It is a circumstance presumptively indicating and expressing the intention, and presumptively also the execution of that intention: but it may be explained away by particular circumstances. In *Onyons v. Tyrer*, the act of cancelling was in some sort merely conditional; it was for the purpose of making way for another disposition, and only for that purpose; and that disposition being never legally



I became the owner  
made 2 wills  
effectually

effectuated, the act of tearing the first will being unaccompanied with any absolute intention of revocation, was held to be inoperative. But where the act of cancelling has not such immediate reference to another disposition by a new will, but is done upon grounds of absolute dissatisfaction with the will already made, the first will shall not be revived by the cancelling or destroying of a second: and the rule is clear that an absolute intentional act of cancellation is an act irreversibly and finally conclusive.

If indeed the first will, after having been deliberately cancelled and its efficacy destroyed, could be revived simply by the cancelling of a subsequent will, as well might a will *de novo* be made by courts of justice for a party deceased out of mere facts and conjectures. There is a great and manifest difference between permitting the act of cancelling to be qualified by reference to the accompanying facts, which may shew it to have been done prospectively and in subserviency to a fresh testamentary disposition; and permitting proof of altered intention inferred from the cancelling of a second will to re-establish the prior will after it had been once deliberately and unconditionally cancelled. This would be a re-making of the will by implication, which we hardly need authority for saying, cannot be done since the statute of Frauds.

The case of *Burtenshaw v. Gilbert* (d) will exemplify the observation just above made. There the testator, in 1759, duly executed his last will and testament. and also a duplicate thereof; but at the same time declared that it was not a will to his mind, and that he should alter it. In 1761 he made another will, which was also duly executed; the devises in which were different from those in the will of 1759; and at the end of it there

If a testator makes duplicates, and cancels one, both are revoked.

(d) Cowp. 49. And see Shep. Touch. last edit. 413. Goodright v. Glazier, 4 Burr. 2514. Winsor v. Pratt, 2 Brod. et Bing, 656. Stride v. Cooper, 1 Phill. Rep. 334.

was a declaration by which he revoked all former wills. After executing the latter will, the testator took one part of the old will in his hands, tore off the name and seal, and directed the person who had made the new will to cut off the names of the witnesses to the old one, which he did in the testator's presence. The testator, at the same time, said that a duplicate of the former will was in the hands of W., a devisee therein. He then delivered the new will to the person that made it, requesting him to take it away with him to his house, and keep it, for reasons which he mentioned. Afterwards a principal devisee in both of these wills died; soon after which the testator sent for the last will; and in 1762 that will was returned to him. The testator, before his death, sent for his attorney to make a new will; but became senseless before he arrived. On his death, one part of the will of 1759, and also the will of 1761, were found together in a paper, both cancelled. The other part of the will of 1759 was found uncanceled in the testator's room among other deeds and papers. How it came there did not appear: but W., a devisee therein, was in the house when the searches were made. The question was, whether the testator died intestate or not; that is, whether the will of 1759 was revoked? And it was held that the will of 1759 was revoked; first by the new will of 1761, which was a complete, legal, and effectual will; and would have revoked the former, whether it had been cancelled or not, for at the end of it there was a declaration revoking all former wills; secondly, because the testator had actually cancelled the will of 1759.

Of the presumption from finding a cancelled and an uncanceled will.

In a recent case in Chancery(e) it was held, that where a testator cancels the part in his custody, the strong legal presumption is that the duplicate in the possession of another was not meant to prevail: that if both are in the possession of the testator, the one cancelled, and the other uncanceled, the presumption of revocation still holds: but it has less strength: that if both are in the

(e) 1 P. Wms. 345.



testator's possession, the one *altered* and cancelled, the other in *status quo prius*, the presumption against the operative existence of either may still remain, but with a strength yet more diminished. (f)

In *Burtenshaw v. Gilbert* the first will was cancelled: but it has been held that where a second will is made, the first remaining uncanceled, and afterwards the second will is cancelled, the first is in force as a good will at the testator's death. Thus in *Goodright v. Glazier*, (g) where a testator, having made a will of lands, and afterwards given the same lands to the same person by another will, omitted to cancel the former, but before his death cancelled the latter, and both were found in his custody at his decease, the second cancelled, the first uncanceled, the first will was held to be effectual; the Court observing "that a will is ambulatory till the death of the testator: if he lets it stand till he dies, it is his will; if he does not suffer it so to do, it is not his will. Here, though the testator made two wills, yet the second will never operated; for it was only intentional; and the testator changed his intention, and cancelled the second so that it had no effect. It was, indeed, no will at all, being cancelled before his death: then the former, which was never cancelled, stood as his will."

Canceled 2  
Will leaving  
first  
Hills  
ambulatory

But to this decision of the Court of K. B., where the subject was real property, a late judgment in the prerogative Court affirmed by the Court of Delegates, is opposed, as to wills of personalty, the proper subject of jurisdiction in those last-mentioned tribunals. In this case the doctrine was elaborately settled that where a prior testament is revoked by a second, the simple act of cancelling the second will not revive the first, so as that without any circumstances, shewing a contrary intention, an intestacy will follow as the legal consequence; but that though the presumption *simpliciter*

(f) *Pemberton v. Pemberton*, 18 Ves. J. 290.

(g) 4 Burr. 2512. and see the book 44 Ass. pl. 36.

is against the revival of the first testament by the cancellation of the second, such presumption may be met by evidence of circumstances, accompanying the destruction of the second, which may give it the effect of restoring the first. (*h*)

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## SECT. VII.

### *Alteration and Erasure.*

Difference in the effect of alteration and mere erasure—alteration being a fresh exercise of the disposing power requires the will to be re-executed, to give effect to the alteration, if of freehold estate.

A WILL is not revoked by alteration or erasure beyond the particular object of such alteration or erasure; which seems to have been a point never precisely in judgment before the case of *Larkins v. Larkins*, lately decided in the Court of Common Pleas. (*a*) We must be careful, however, not to confound erasure with alteration; since the latter, if it consists in making any new gift or disposition, is to that extent another devise, and will clearly require the will to be re-executed according to the statute. The case of *Larkins v. Larkins* was in effect as follows:

William Larkins by his last will, duly executed, devised his lands in M. to his brother, John Pascall Larkins, Samuel Enderby the younger, of Aldermanbury, in the city of London, Esquire, and George Smith, of Lincoln's Inn, in the county of Middlesex, Esquire, their heirs and assigns, upon trust, to sell the same lands for the purposes in the will mentioned. He also gave the residue of his estate and effects to the same persons, and appointed them his executors and the guardians of his daughters. After this will was executed, the testator, with his own hand, made the following alterations:—in the first devise to the three trustees, the words “the younger” and George Smith, of Lincoln's Inn, in the county of Middlesex, Esquire,” were struck

(*h*) *Moore and Metcalf v. De la Torre v. Moore*, 1 Phill. 375.; and *Moore v. Metcalf*, *ib.* 406.

(*a*) 3 Bos. et Pull. 16.

out by a pen drawn through them: in the bequest of the residue, the words "the younger" and George Smith, their heirs, executors," were struck out; but over the words "heirs, executors," was written the word "stet;" in the clause appointing guardians, the words "the younger" and "George Smith," were struck out; and, lastly, in the clause appointing executors the words "the younger" and "George Smith" were struck out. The testator never in any manner re-executed or re-published his will after making the above-mentioned alterations. And the question was, whether the devise of the real estate to be sold was revoked, by the testator's having struck out the name of *George Smith*, one of the trustees, after the execution of the will.

The ground upon which it was contended that it was revoked was mainly this, that after devising the same estate to two persons, by revoking that devise as to one the testator had necessarily altered the estate of the other by enlarging it; and that if it could operate at all, it must operate as a new gift; for whatever alters either the quantity or quality of the estate of the devisee must be considered as a new devise. This position, however, in which the strength of the argument for the total revocation consisted, was positively denied by the court; by whom it was observed, that in a court of law the trustees must be considered as joint tenants in fee; that whatever alteration in the interest of the other trustee was created by this erasure, it was an alteration not arising from a new gift, but merely from a revocation. And Mr. Justice Chambre put the point thus:—The devisees being joint-tenants, are seised *per my et per tout*: but if one joint-tenant die in the life-time of the testator, the other joint-tenant takes the whole of the estate, though it never vested in him during the life of the testator; the reason of which is that the original devise is *sufficient to pass the whole interest*. (2) Had

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(2) See Page v. Page, 2 P. Wms. 489. *Man v. Man*, 2 Strange 905. Mr. Justice Chambre seems to have put the decision of this

this been the case of a tenancy in common, upon the erasure of one name, the remaining two would take no more than the two-thirds of the estate (3).

An erasure of a part of a will does not necessarily operate as a revocation of the whole. And it is always to be recollected that the statute of Frauds gave no new or positive efficacy to these symbolical modes of revoking a will, but left them upon the same footing as they stood at common law. (b)

Short on the demise of *Gastrell v. Smith*, which was determined a few years ago in the Court of King's Bench, (c) was the case of an erasure of the name of one of the trustees, accompanied by the additional fact of the substitution of others in his place. There a testator devised lands to two trustees, in trust for certain purposes, by a will duly executed and attested;

(b) See Carthew. 81.

(c) 4 East, 419.

case upon its safe ground, *viz.* that the will was not altered by the erasure, as it was made to carry no more than it was originally framed to carry, since each joint-tenant takes the whole estate. But it would be a very different case if an erasure added to the *quantity* of interest carried by the will: as, suppose the words 'for and during his life,' after a gift by a testator of all his freehold estate to B., to be erased; this would convert an estate for life into a fee. And even if the erasure only change the quality of the estate, it would seem to be a fresh exercise of the disposing power, and to require a fresh execution; as if, after a gift to two and their heirs, the words 'equally to be divided between them' were to be struck out, this would not be merely a revocation but an altered devise.

(3) Where a devise is to several as tenants in common, and one dies in the life-time of the testator, the devise to him becomes lapsed. *Bagwell v. Dry*, 1 P. Wms. 700. and *Page v. Page*, 489. But if a testator devise to A. B. and C. as tenants in common, and *at the time of the devise* only C. is living, although C. will not take the whole estate, yet there is no lapse, properly speaking, of the shares intended for A. and B.; but they pass with the residue, or go as if they had not been mentioned. If, however, the devise be to a class of persons generally, as to the sisters of T. H., and only one out of several was living at the time of the devise who survives the testator, such survivor becomes entitled to the whole. *Doe and Stewart v. Sheffield*, 13 East, 526.

and he afterwards struck out the name of one of those trustees, and inserted the names of two others. The will was not afterwards republished: but the court held that his intent appearing to be only to revoke, by the substitution of another good devise to other trustees, as such new devise could not take effect for want of the due execution of such altered will under the statute, it should not operate as a revocation; or, at most, it could only operate as a revocation *pro tanto* as to the trustee whose name was obliterated. Here it was said, in support of the revocation, that the insertion of the two new trustees in the room of the one whose name was obliterated distinguished this case materially from those of *Larkins v. Larkins*, and *Humphries v. Taylor*; (d) because it manifested the devisor's intent that the remaining old trustee should not take alone.

But the court observed, that the facts of the case plainly shewed that the testator had no object but to change his trustees; and it would be unreasonable, when he had not by any thing he had done indicated a disposition to dispose of his lands to different purposes from those declared by his will, to infer that he designed that his will should become inoperative, and so to let in his heir at law by what he did, rather than to conclude that he thought he had by the alterations introduced made a valid disposition of his estate to the new trustees, and had no design to alter his will except so far as such obliteration and alteration could effectuate that purpose, by substituting the persons whose names he interlined in the stead of him whose name was struck out. If, then, the testator meant no revocation but by means of that which he, through mistake, supposed to be a valid disposition to others, and had no intention to revoke by the obliteration he has made, but by an effectual substitution meant to be made of others in the room of him whose name was so obliterated, the case must be governed by that of *Onyons v. Tyrer*.

(d) 5 Bac. Abr. tit. Wills and Test. 363. Edit. Gwyllim.

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***Mistake.***

**Where a testator expressly revokes under an obvious misapprehension of facts, the revocation does not take effect.**

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residence to be in America ; and by a codicil he revoked these legacies, *giving as a reason*, that the legatees were dead : but the supposition as to that fact being erroneous, the legatees were held to be entitled under the will, upon proof of identity (1). But where a testatrix by codicil gave to A. the legacy which she had given by her will to the children of B. prefacing such alteration thus, “ As I know not whether any of them are alive, and if they are well provided for,” though they were in fact living, A. was nevertheless held to be entitled, the words above cited being construed to mean that if they were living they were well provided for.

But before such express revocation can be vacated upon such grounds, it ought to appear very distinctly, that the mistaken facts were the impelling motives (2)

The mistake should appear to be in that which constituted the impelling motive to the revocation.

(1) The case mentioned by Cicero, in his Treatise De Oratore, lib. 1. c. 38. has been often cited, and relied on, as a sort of authority in our Courts, more especially in those where the civil law is taken as a guide, for admitting evidence of this mistake of facts to affect the validity of a testamentary disposition. We are to observe, however, that in that case the error was occasioned by palpable misrepresentation, and that such misrepresentation was the immediate and sole impelling motive with the testator for altering his will. “ What cause (says Cicero) could be more important than that of the soldier, whose death being announced at home by a false messenger from the army, the father trusting to the report, made another his heir, and died.” There was also another question, arising upon that case, on the principles of the civil law, *viz.* whether a son could be disinherited of his patrimony, (for by that law he had an inchoate sort of property in his father's effects,) whom the father had neither appointed heir by his testament, nor disinherited by name ? And this last reason seems to have been alone objection enough, as the will was by such omission what the civil law denominated “ *testamentum inofficiosum*.” But the error as to the fact, seems also to have been considered as a good ground of objection by Cicero. See also *James v. Greaves*, 2 P. Wms. 270.

(2) If a man gives a legacy to his wife by the description of his *chaste* wife, evidence of her incontinence is not admissible. And if a testator, out of love and affection to a child, supposing it to be his own, had given it a legacy, and it turns out that the child was not his own ; in such a case, according to the opinion of Lord Alvanley, in *Kennell v. Abbott*, the legacy would not be revoked by the mistake.



to the revocation ; and it must be remembered, that in the *Attorney General v. Lloyd*, (b) Lord Hardwicke observed, that “it is a very nice thing to say that because the reason a man gives for his devise is false, that therefore his devise shall fail, and how far that will extend I cannot say.” The case of the *Attorney-General v. Lloyd* was shortly as follows :—J. M. by his will, dated February the 8th, 1734, gave particular lands, and his personal estate to be laid out in lands, to charitable uses ; and by a codicil, dated July 12, 1736, declared that if by the mortmain act the estates could not pass to those uses, he gave them to M. B. and his heirs. By a second codicil of the 17th of March, 1736-7, reciting that he had been advised that the devise of his lands was void, gave his *personalty* to the same charitable uses, and his real estate to M. B. The mortmain act passed in 1736, and the testator died the 8th February, 1737. The advice upon which the testator professed to proceed appeared not to be well founded ; for it had been decided in *Ashburnham v. Bradshaw*, (c) by the certified opinion of all the Judges, (d) that a devise of lands to charitable uses, made before the statute of mortmain, *notwithstanding the testator survived the statute*, passed the lands.

But Lord Hardwicke reasoned thus, on the principal case : “ That the testator was so advised was a fact, in his own knowledge ; and he grounded the devise in the codicil upon this advice, and not upon the reality of the law ; for, however that might turn out, he might be

(b) 3 Atk. 552.

(c) 2 Atk. 36. and see the cases in note 1. Ed. Sand.

(d) Except Denton, J. who was in ill health.

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But where a legacy was given to a person under a particular character, which he had falsely assumed, and which alone could be supposed to be the motive to the bounty ; as, where a woman gave a legacy to a man in the character of her husband, whom she described as such, but who at the time of the marriage-ceremony with her had a wife living, the legacy failed. *Kennell v. Abbott*, 4 Ves. J. 802.



anxious to quiet a doubtful question, and to prevent its being litigated after his death, by settling it upon some certain foundation." But the principal reason which weighed with his Lordship was, that he doubted whether the new disposition by the codicil was put singly upon the point of law, the words of which were, "it being my intention that the charity should be continued, and being advised my personal estate can be given, I do, therefore, by this codicil, give my personal estate to the charitable uses before mentioned; and I do hereby give my real estate to M. B." A case was made for the opinion of the Judges of the King's Bench, and that Court certified in favour of the devise of the real estate by the codicil.

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## SECT. IX.

*Accident and Surprise.*

THERE may be something also in the circumstance of a testator's being prevented by surprise, or even by a sudden accident, when coupled with other particulars in his situation indicating the probability of an intended revocation, which may be allowed to operate a revocation of his will. *Wells v. Wilson*, (a) determined at the Cockpit in 1756, on appeal from the West Indies, lends support to this supposition; which case was as follows:

A. wrote his will on one side of a sheet of paper, but neither signed nor sealed it. On the other side he wrote another will, and signed and sealed it. They appeared to be both written at the same time, though it seemed impossible to determine which had been written first. There was a trifling difference. He had provided for the infant then *in ventre sa mere*, and who afterwards was born in his lifetime. Sometime after

(a) Cited by Sir Geo. Hay, in *Shepherd v. Shepherd*. See 5 T. R. 49.

this A. died, leaving his wife ensient with a child which was afterwards born. The question was, whether the will was thereby revoked, as the posthumous child was entirely unprovided for. Evidence was produced to shew that in his most serious moments he had declared that he had made no will, but was resolved to do so on the first opportunity, mentioning that the situation of his family required such precaution.

While he was in this state of mind, he had the misfortune to receive his death wound by a fall from his horse; and in the short interval between the fall and his death, his thoughts were employed on the making of his will; and accordingly he sent for a professional person: but losing his senses, and dying soon after, the paper was all that was found. The great doubt with the Court was, whether the will was prior or posterior to the paper written on the back of it. And, in order to come at this, they adjourned the case for six months, that they might enquire further as to that fact. But this enquiry was fruitless; and therefore the Court directed that it should stand for argument on its particular circumstances. And at length, the Lords of the Council, upon a view of the whole matter, and the co-operating argument of a child's being then unprovided for, set aside the will. The decision did not turn upon the naked fact of the birth of a child unprovided for, but upon such fact coupled with the frequent declarations of the testator, the state of his mind, and his repeatedly declared intention in the interval between the fall and his death.

This is the manner in which the judgment in that case is accounted for by the learned Judge of the Prerogative Court, in *Shepherd v. Shepherd*. He appears, however, to have omitted that circumstance in the case, by adverting to which it would seem that the propriety of admitting the evidence of declared intention would lie less open to the objections arising from

(b) See further on this subject in the chapter on the revocations of Wills of personal estate.

the statute of Frauds, *viz.* the suddenness of the accident, which was a surprise upon intentions proved to have been frequently expressed, and so natural under the circumstances of the testator's family to have existed in his mind.

A case of this sort is mentioned in the first volume of Roll's Abridgment. (c) A. made his will, according to the statute, and afterwards revoked it by parol, and then declared his intention to alter it when he came to D., but before he could come to D. was murdered; the will was held to be revoked.

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## SECT. X.

### *Of the Revocation of Wills made under Powers.*

IN a former part of this Treatise, where the efficacy of wills was under consideration, that part of the subject was viewed in its connection with wills made under, and in execution of, powers: it is important also to consider how the law in respect to revocations applies to this description of wills.

A will made in execution of a power is, to all intents, a will: it is ambulatory and incomplete till death, and alterable and revocable by cancellation, or any of the methods whereby a will, in the strictest and most absolute sense, is so affected. It is also equally clear that if an appointee under a power executed by will die before the appointer, the interest under the appointment fails by lapse, as in the ordinary cases.

A will whereby a power is executed is accompanied by all the incidents which belong to the nature of that instrument.

This rule is universal. A will of copyhold, though, where it is after a surrender, it is not considered as the act by which the estate is transferred, (that being the operation of the surrender), is nevertheless in its own nature specifically a will, though in its instrumentary operation it is only directory of the uses of the sur-

So in respect to a will of copyhold, though not properly the act by which the estate is transferred.

render. Thus, when the previous surrender was necessary, if a copyholder surrendered to the use of his will, and then made his will in favour of A. and survived him, the benefit was gone; for, as a will, the appointing instrument was inoperative till the death of the appointer; and if the appointee was not then in existence, the gift could not take place. (a)

An appointee under a power must claim according to the nature of the instrument by which the power is directed to be executed. Thus, if a power is given by deed to appoint lands by will, and the person to whom the power is given makes his will accordingly, and gives the lands to A. *and his issue*, which words in a deed convey only an estate for life to the grantee, though the devisee takes properly under the power; yet, because the appointment is by will, the words are construed to convey an estate tail. So, if it were "to A. for ever," the estate would be construed a fee-simple for the same reason.

Upon the same grounds, such an appointment by will, in execution of a power, is revocable; (b) and therefore, though, where a power is executed by deed, unless a power of revocation is reserved by the deed, (and such fresh reservation of power to revoke may be made *toties quoties*,) the appointment cannot be revoked (1), yet if it be executed by will, no such fresh power of revocation need be reserved; (c) the nature of the instrument supplies it.

(a) See the great case of the Duke of Marlborough v. Lord Godolphin, 2 Ves. 61.

(b) 2 Ves. 77. S. C. *ibid.* 610. and see Robinson v. Harcourt, 2 Bro. C. C. 30. Reid v. Shergold, 10 Ves. J. 370.

(c) Hatcher v. Curtis, 2 Freem. 61. and see 1 Ves. 139. 1 Bro. C. C. 533. 2 Bro. C. C. 319.

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(1) Hatcher v. Curtis, 2 Freem. 61. Such appointment by deed cannot be revoked without a fresh reservation of a power in the executing instrument for that purpose, though the original deed should expressly authorize such future revocations as was adjudged in the leading case of Hele v. Bond, Prec. in Ch. 474.

By the case of *Cotter v. Laver*, (d) which has been already cited to shew that a covenant entered into for valuable consideration amounts to a conveyance in Courts of equity, and is therefore, in those Courts, held a revocation of a will, it also appears that, where the will works as an appointment under a power, it is equally revoked in equity by such executory contract under seal. In that case, though the will was made in execution of a power by a married woman, who cannot in strictness make a will at all, (2) and the conveyance was only *in fieri*, yet the first instrument was adjudged to be revoked by the second.

Lord Hardwicke decided the case of *Oke v. Heath*, agreeably to this doctrine, declaring that the foundation of his opinion was, that wherever such a power to appoint is given to a married woman, which she executes by will, it is subject to all the qualities of a will. She has, said his Lordship, executed her power by will, and called it so throughout. The whole frame is testamentary. And although this arises out of her power to make a will, and it is a general notion of law as to powers, that any one taking under the directions of the will takes under the power in the same manner as if their names were inserted there; yet they must take according to the nature of the power and instrument taken together. And in another place, (e) Lord Hard-

(d) 2 P. Wms. 662.

(e) 2 Ves. 78.

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(2) If a married woman, with the consent of her husband, make a will, the same must be proved in the Ecclesiastical Court, *Mariot v. Kinsman*, Cro. Car. 219.; and the will of a feme covert cannot be given in evidence until it has been proved in the Spiritual Court; see *Jenkin v. Whitehouse*, Burr. 431. and *Stone v. Forsyth*, Doug. 707. where Lord Mansfield says, if the Ecclesiastical Court will not grant probate, the proper course is to appeal to the delegates. Mr. Douglas in note (+ 150) ib. observes, that the regular course in cases like this, is for the Spiritual Court not to give probate of the will, but administration with the will, as a testamentary paper, annexed.—See *Ross v. Ewer*, 3 Atk. 160. edit. Sanders, note (1).

wicke is more explanatory on this particular point, where he says, that the meaning of persons taking *under* the power, as if their names had been inserted in the power, is, that they shall take in the same manner, as if the power and instrument executing the power had been incorporated in one instrument: they shall take as if all that was in the instrument executing had been expressed in that giving the power. So it is, said his Lordship, in the appointment of uses. If a feoffment is made to such uses as one shall appoint by will; when the will is made, it is clear that the appointee is in by the feoffment: but he has nothing from the time of the execution of the feoffment, so as to vest the estate in him. The estate will vest in him according to the nature of the act done, and the appointment of the use from the time of the testator's death. This, therefore, is not a relation so as to make things vest from the time of the creation of the power, but according to the time of the act executing the power. (*f*)

(*f*) And see *Venderzee v. Aclom*, 4 Ves. J. 771.

## CHAP. II.

REVOCATION IMPLIED FROM SUBSEQUENT DEALINGS WITH  
THE SUBJECT OF THE TESTAMENTARY DISPOSITION.

## SECT. I.

*Subsequent Conveyances at Law.*

THE general rule that where, after making a will, the testator executes any legal conveyance of the devised property the will is revoked, has long been established. This rule seems to rest upon technical grounds; and, in regarding its whole extent, we shall find that the inference of *intention* to revoke by no means affords a satisfactory foundation for it. The true reason seems to be that which Lord Hardwicke gives in *Sparrow v. Hardcastle*, “that the estate being gone by the conveyance, the will has lost the subject of its operation.”

The alteration of the devised estate by the act of the deviser himself is a case of daily occurrence, and admits of some distinctions of great nicety. It will be proper to begin with some examples illustrative of the general rule.

If a tenant in tail makes his will and devises his land, and then by bargain and sale enrolled makes a tenant to the *præcipe*, against whom a common recovery is suffered to the use of the testator in fee, this is a revocation of the will. (a) And it was said by Lord

A recovery by tenant in tail, after making his will, to his own use in fee, is a revocation. And this, though the party declares he does it to confirm his will.

(a) *Dister v. Dister*, 3 Lev. 108. See also to the same point, *Marwood v. Turner*, 3 P. Wms. 163.

Hardwicke to have been holden that where a man, after making his will, thinking he had only an estate tail, suffered a recovery to confirm the will, such act by the testator was a revocation instead of a confirmation of the will. (b)

So also if a testator, after having made his will, levy a fine to such uses as he shall by deed or will appoint, and die without making any new will, the will made prior to the fine is thereby revoked. (c)

A feoffment by a tenant in fee, after making his will, to his own use in fee, is a revocation.

So is an ineffectual recovery.

Conveyance upon a special trust, or for a particular purpose, how far a revocation.

And if a tenant in fee simple devises his lands, and before his death makes a feoffment of those lands to another, to the use of himself and his heirs, though this to many purposes is no alteration of the estate, for he is absolute owner as he was before, yet it is a revocation. (d) And where a tenant for life, remainder to trustees to support contingent remainders, remainder to his first and other sons in tail, with reversion to himself in fee, made his will disposing of the reversion, and afterwards suffered a recovery and limited the use to himself in fee, this, though an ineffectual recovery, was nevertheless a revocation of the will. (1)

The apparent hardship of this rule has occasioned some struggles to resist its application, where it has been most obviously opposed to the testator's intention. Thus it has been often contended that where the alteration of the estate was only for an express particular and partial purpose, not affecting the substantial and beneficial interest given by the will, the will should not be affected by it. Upon this ground, in *Sparrow v. Hardcastle*, it was endeavoured to be maintained that the conveyance being designed for a

(b) Per Lord Hardwicke in *Sparrow v. Hardcastle*, 7 T. R. 416. note.

(c) *Doe and Dilnot and Others v. Dilnot*, 2 N. R. 401.

(d) 1 Roll. Abr. 615.

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(1) 3 Wils. 6. *Darley v. Darley*; and see the remarks made upon this case by the late Lord Loughborough in *Brydges v. the Duchess of Chandos*, 2 Ves. J. 430.



particular purpose, *viz.* to create a trust for the benefit of a person named in it, subject to which the trust declared was to the grantor and his heirs, it was the same as if he had left it to result, and so much of the trust as remained in him would pass by the will: but Lord Hardwicke rejected this reasoning; and declared his opinion to be, that if a man seised of a real estate devised it, and afterwards conveyed the legal estate, though only upon a special trust, yet as he granted the whole legal estate, it was a total revocation of the will.

Lord Lincoln's case (2), which was decided by Lord Somers, is a strong authority to the same point; and, as was observed in *Sparrow v. Hardcastle*, there could not be a more special case. Edward Earl of Lincoln had mortgaged the manor of S. to Wynn by a conveyance in fee, and afterwards by will, in default of issue male of his own body, devised it to Sir Francis Clinton (who was to succeed to the title) for his life, with remainder to his first and other sons in tail, with remainders over. The Earl having afterwards taken a fancy to one Mrs. Calvert, and having some notion he might marry her, (though it was proved in the cause there never was any intention in the lady or her relations respecting such marriage, nor any treaty about it,) made a lease and release of the devised premises to trustees, to the use of himself and his heirs till the said intended marriage should take effect; then as to part in trust for Mrs. Calvert and her heirs, in lieu of dower, and as to the rest in trust that the trustees should sell it, to disencumber the part limited to Mrs. Calvert, and to pay the surplus of the monies to his executors and administrators. Nothing was afterwards done towards the marriage; and some time after the will the

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(2) Show. P. C. 154. 1 Eq. Ca. Abr. 411. 2 Freeman, 202. and said by Lord Hardwicke in *Sparrow v. Hardcastle*, vid. 7 T. R. 418. is not to be well reported in Fitz-Gibbon, 241. which was in general a book of no authority.

Earl died without making any alteration of it, leaving his honours to descend to Sir Francis Clinton, who had but a small estate, if any, and who died soon afterwards. The plaintiff, the eldest son of Sir Francis, brought his bill to have a redemption of the mortgage, and a conveyance of the estate. And the defendants, who were cousins and co-heirs of the testator, brought their cross-bill to be allowed to redeem and to have the estate conveyed to them.

The question was, whether the lease and release by the testator was a revocation; and though it was plain he did not intend, in the event which happened, to revoke his will, and though by the release the estate was limited until the marriage (which it did not appear was ever seriously either in *his* contemplation or in that of the lady) to continue in the testator just as before; the will was nevertheless held to be revoked. It is to be observed that the conversion of this estate into an equitable interest by the mortgage in fee was the circumstance which brought this case into the Court of Equity, and that there was nothing in it of peculiarity which varied the effect of it in the view of that Court; so that the doctrine of *equitas sequitur legem* was entirely applicable to it; and as by the rule of law, if this had been a legal estate the will would have been revoked, there was no reason why a Court of Equity should proceed on a different rule in determining the case. The decree was confirmed in the House of Lords by a majority of two lords only.

Where that which is done to an equitable estate would, if the estate were legal, pass it out of one person to another, such act is a revocation in equity, upon the rule of *equitas sequitur legem*.

The deeds executed in the above case were such as, had the estate been *legal*, would have passed the estate out of the testator; and wherever that is the case, the will is revoked at law. (3) Upon the principle of

(3) The uses of the intended settlement were certainly inconsistent with the will; but that made no part of the reason for holding the will to be revoked by the lease and release. It was so held solely upon the ground that the devised estate was for a moment parted with and put out of the testator, notwithstanding the whole estate was taken back by the same conveyance.

analogy, therefore, and of that uniformity in the rules regarding property which is so important to be preserved, a Court of Equity was bound to follow the authorities of the common law courts in the decision of the case just cited, whatever inconvenience to the parties, or repugnancy to common feelings, might be the consequence; and in this view, that is, in reference to the consistency and generality of an artificial system of reasoning, there does not appear to be that absurdity in the case of Lord Lincoln which has been charged upon it by a great judge. (e)

But by a case of great importance, which was afterwards decided in K. B. (f) on a writ of error from the Common Pleas, whose judgment the superior Court confirmed, the general rule may be considered as established to the effect following: That where a person, seised of an estate, devises it, and afterwards conveys away his whole estate, though but for an instant, as merely to give a seisin to serve an use, and though he takes back the same estate to the same use as before, or such use is left to result to him so as to be descendible from him either in the paternal or maternal line as it was before, yet the conveyance operates as a total revocation of the will. And though the object of the conveyance be ever so partial or minute, and whether such object be certain or contingent, the same consequence of a total revocation flows from the mere act of parting with the estate. And from the authority of this case together with that of Lord Lincoln above cited, the conclusion is, that whether such estate be legal or only equitable, the same mode of acting upon it by passing it out of the testator, or if that cannot be strictly said of an equitable interest, by doing that with respect to it, which, if it were a legal estate, would pass it out of him but for a moment,

If the estate is parted with but for a moment, and the same use is taken back, the will is revoked.

(e) Lord Mansfield, Doug. 722.

(f) 7 T. R. 399. 1 Bos. and Pull. 576. Goodtitle on dem. Holford and Others v. Otway.

will produce the same consequence of a total revocation.

In the case last referred to A., being seised of certain estates in fee-simple, agreed by his marriage articles to settle the same so as to secure his intended wife's jointure, and the portions of younger children, and then upon his eldest son and his heirs male. He afterwards devised the same estates, in case he should happen to die without leaving any issue of his body living at his decease, subject to any jointure he might make, to trustees, for a term of 500 years, upon the trusts therein-after declared, and subject thereto he devised all his real estate to B. The testator afterwards conveyed the same estates by lease and release to releasees, to the use of himself and his heirs, till the marriage, and then to uses correspondent to the various purposes expressed in the marriage articles; and for default of issue, subject to a term for securing his wife's jointure, to himself in fee. The testator married accordingly, and died without issue. And whether his will was revoked by the settlement was the question.

Those who argued against the revocation contended that the intention of the testator was evidently not to revoke the will; and that as this intention appeared, without any resort to extrinsic evidence, from the instruments themselves, the Court was bound to give it effect. That though in point of form an estate did pass out of the testator to the releasees, yet that was but a momentary effect of the conveyance, for by the limitation of the use to himself, and his heirs, till the marriage, he was still in of his old use; and the only operative part of the settlement was that which limited the uses according to the articles, in an event in which the will was to have no operation. That this was a very different case from a feoffment and refeoffment, where there was a complete alienation of the land, and an entire new estate was taken back by purchase. That the doctrine must have been originally founded upon an intent to revoke, either expressed or necessa-

rily to be implied by law from the inconsistency of the two dispositions: but that, in the case before the court, the two instruments were not only not inconsistent, but the one referred to and confirmed the other, and the settlement was only made in pursuance of the articles. That in all the cases of total revocations implied from subsequent instruments, the deviser changed the whole estate, or the dispositions were inconsistent; but that in the case under consideration there was no inconsistency, nor was the estate changed as to that part of it on which the will was to operate; for the operation of the will was confined to the old fee-simple, which by the limitation in the settlement was returned back to the testator. There was, it was said, no new modelling of the estate, for the acts which took place subsequently to his will were in the testator's contemplation at the time; so that the question was broadly this,—whether, where the intention was manifestly against a revocation, the instrumental mode of carrying the intention into effect should nevertheless produce the legal consequence of a revocation.

But the Court decided, that as the testator parted with the estate, notwithstanding the old use resulted to him again, still the conveyance operated as a revocation of the will, because *it drew out of the testator the subject matter upon which the will was to operate.*

And in the late case of *Vawser v. Jeffery (g)* the Lord Chancellor expressed himself with great distinctness as follows upon this subject. “It is now settled, at least I shall so consider it, until the House of Lords decides the contrary, that if a man devises a fee-simple estate, and afterwards, for securing a jointure, instead of limiting a jointure, which would be quite enough, by lease and release conveys the estate out of which the jointure is to come, to the use of himself for life, with remainder to the intent and purpose that the intended

(g) 2 Swanst. 273.

wife may take a rent charge, and to the use that she may distrain, and then to enter, with remainder to trustees, for ninety-nine years, the better to secure the jointure, with the ultimate remainder to himself and his heirs, although the moment he takes the seal off the wax his old estate is *eo instanti* vested in himself, that is a revocation of the will. We are to remember, however, the distinction between such a case as above supposed by Lord Eldon, and mortgages, conveyances and for payment of debts, or to secure mere personal interests, which are looked upon in Courts of Equity as mere personal securities.

Such a series of well-considered cases have concurred in establishing this particular doctrine on the subject of revocation by a subsequent conveyance, that the general rule, as laid down in the preceding pages, may now be considered as finally at rest. (4) It seems a little extraordinary, indeed, that when once it had been received in all the courts as a rule, that a conveyance by a testator of the devised *lands* to the use of himself, and his heirs for ever, was a total revocation of his will, it should afterwards be contended, that a conveyance of the fee to particular uses, and for a partial purpose, was not a revocation beyond those uses, or the exigency of that partial purpose.

This rule results from the necessity for the testator's being seised at the time of making his will, and continuing so to the time of his death.

The rule respecting the revocation of wills does not in this instance rest upon the intent to revoke, but is best accounted for by considering that the testator must actually have the interest in him, which he attempts to devise, at the time of making his will: and that as the will is inchoate at the time of making it, and consummate by the death, it must have a potential existence during the interval, and by consequence the interest on which it is to operate must uninter-

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(4) *Vawser v. Jeffrey*, 16 Ves. J. 519. By Sir W. Grant, the question is no longer open to controversy.

ruptedly continue, during the whole period, in the testator.

If a man, after making his will, surrender his copyhold not to the use of his will but to new and other uses, his will is revoked, although he die before any admittance in pursuance of such surrender; and it has been held that even a covenant to surrender will produce the same effect if the surrender would have been a revocation at law. (i) But if, after having surrendered to the use of his will, a copyholder in fee surrenders to new and particular uses, with reversion to himself in fee, it has been held that he may devise the reversion, without any fresh surrender to the use of his will. (k) And where a copyholder, seised in fee, surrendered to the use of himself for life, with remainders over, and the ultimate limitation to himself and his heirs; and afterwards surrendered to the use of his will, and made his will accordingly; and then was admitted on the former surrender, it was determined to be no revocation of his will; for his admittance related to the time of such former surrender, and so was constructively prior to the will, which, as well as the surrender on which it was grounded, operated upon the fee limited to the heirs of the settlor which was the old estate, the use having resulted by operation of law: the admission had respect only to the new uses; it left the reversion as it was. (l)

(i) *Vawser v. Jeffrey*, 16 Ves. J. 519. And see 2 Swanst. 268.

(k) *Thrustout d. Gower v. Cunningham*, 2 Blackst. 1046.

(l) *Roe d. Noden v. Griffith*, 4 Burr. 1952. 1 Blackst. 605.



## SECT. II.

*Of subsequent Conveyances in Equity.*

If a man having an equitable estate in fee-simple, makes his will, and afterwards takes a conveyance of the legal estate to himself and his heirs, it is no revocation.

IT has been already shewn that equity preserves an analogy as to the effect given to a testator's acts, as operating to revoke his will; and that therefore any disposition or disturbance of the estate, which at law would have produced a revocation, will be followed by the same consequence where the subject is equitable. But if, after a will disposing of an equitable estate, the testator takes a conveyance to himself and his heirs of the legal estate, this is no revocation of the will. (1) For nothing here passes out of the testator, and what he has subsequently acquired is, at least in consideration of equity, nothing new, in as much as in the view of a Court of Equity, he had the complete estate before, and therefore that judicature does not regard the property as at all altered.

But if, having the legal estate, he devises it, and then passes it to trustees for himself and his heirs, the devise is revoked.

But if this case be reversed, and the facts be supposed to be, that a man seised of a legal estate in fee-simple makes his will, and then conveys the estate to another in trust for himself and his heirs, the will is clearly revoked in law, because the subject of the devise is parted with, and the estate which is subsequently acquired in equity is a totally new estate, and therefore not included in the will. (a)

If, where the legal estate is called in after a will is made, any new use is engrafted upon it, the will is revoked.

In *Parsons v. Freeman*, (b) it was agreed by the mar-

(a) *Thrustout d. Gower v. Cunningham*, 2 Blackst. 1046.

(b) 3 Atk. 741.

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(1) By Lord Hardwicke, in *Parsons v. Freeman*, 3 Atk. 741. and by Lord Loughborough, in *Bridges v. Chandos*, 2 Ves. J. 429.; and see the case cited by Lord Loughborough from Roll. Abr. 616. pl. 3. *Cestui que use* before the statute of uses, devises; afterwards the feoffees make a feoffment of the land to the use of the devisor; and after the statute the devisor dies, the land shall pass by the devise. And see *Watts v. Fullarton*, Dougl. 691.



riage articles, that the wife's lands, of which she was seised in tail, should be conveyed to the intended husband in fee ; they married ; the husband made his will, and devised these lands : and afterwards the husband and wife suffered a recovery of the same lands to such uses, and for such estates, as they should jointly appoint ; and, in default of appointment, to the use of the husband and his heirs. She died without appointing ; and it was decided by Lord Hardwicke, that the will was revoked ; his Lordship at the same time admitting, that, if the husband had only taken the legal estate by the recovery, to execute it into the equitable estate, it would have been no revocation ; but in the case, as it stood, *new uses* were created ; and though no appointment was made, yet the fee was by the recovery taken differently qualified. (c)

So where a man, having bound himself by articles, makes his will, devising so much as the articles were not intended to operate upon, and then conveys his legal estate upon trusts, by way of settlement in execution of the articles. Upon the principle of the decision in the decisive case of *Goodtitle v. Otway*, above cited, such a conveyance in trust as last-mentioned would be a complete revocation of the will. The case of *Williams v. Owen*, (d) which was decided at the Rolls in 1795, a few years before *Goodtitle v. Holford*, appears to have proceeded upon a contrary doctrine : but that case has been considered as open to great doubt, since the decision of the case of *Goodtitle v. Holford*.

The case of *Williams v. Owen* was shortly this : a man being seised in fee, by articles prior to marriage, covenanted to convey his estate to trustees, to the use of himself for life, remainder in trust to secure an annuity to his wife in bar of dower ; remainder to trustees for a term to raise portions ; remainder to the sons and daughters successively in tail ; remainder to his own

Comments on the case of *Williams v. Owen*, and *Brydges v. Duchess of Chandos*.

(c) Et vid. *Tickner v. Tickner*, cited 3 Atk. 741. . 1 Wils. 308. .

(d) 2 Ves. J. 595. .

right heirs. He afterwards made his will, and devised the reversion in fee in the event of his dying without issue; and afterwards and before marriage, executed a settlement in pursuance of the articles, by which he conveyed the estates to trustees, and their heirs, to the uses and upon the trusts of the articles. It was holden that this settlement did not revoke the will, being nothing more than a mere legal execution of the articles.

The Master of the Rolls compared this case, in principle, to that wherein a testator, having devised an equitable estate, takes a conveyance of the legal estate from his trustee, to himself and his heirs, or to the uses of the will. He admitted that after the articles the deviser remained seised of the legal estate, and passed it out of himself by the conveyance; but he said that by the articles he had reduced himself to a remainderman in fee in equity; that having this ultimate trust in fee he devised it, and then the subsequent act with respect to this fee was no more than clothing it with the legal estate. The objection to this reasoning, however, is, that it is not strictly according to the fact, but seems more like misapprehension than could have been expected from so accurate a Judge, for there seems to be no propriety in considering the testator as having converted himself by the articles into an equitable remainderman. He clearly retained the whole fee simple in law; and the ultimate reversion, being a part of such fee, was comprised in the will, and afterwards conveyed out of the deviser, which brings the case clearly within the range of the doctrine above discussed.

In alluding to the case of *Brydges v. the Duchess of Chandos*, his Honour observed, that it was impossible not to see that the judgment in that case which gave to the settlement the operation of a revocation was founded upon the variation of the settlement from the articles; and he took it to have been clearly the Chancellor's opinion, that if the settlement had fully

followed the articles in the case before him, there would have been no revocation.

It is evident, however, that if that was the inclination of the Chancellor's mind, he was furnishing reasons and authorities against his own opinion, by the long preface to his very learned and able decree in that cause, wherein he has elaborately expounded the doctrine of virtual revocations by the alienation of the subject of the devise upon the principle and nature of wills, which indispensably require a continuation of the same interest from the making of the will to the time of the testator's death.

The facts of the case of *Brydges v. the Duchess of Chandos* (e) were shortly these: the Duke of Chandos, on the 20th of June, 1777, by articles previous to his marriage, covenanted that he would, within six months after his marriage, convey lands in such manner that he should be seised in fee, and his wife entitled to dower if she survived him; and also that he would, within twelve months after the marriage, settle the said estates subject to the dower of the Duchess to the use of himself for life, to trustees to preserve contingent remainders, remainder after the deaths of the Duke and Duchess to trustees for a term, to raise portions for younger children; remainder to the first and other sons of the marriage in tail male; remainder to his own right heirs. The Duke also covenanted, that, in case the dower should not be equivalent to 2000*l.* per annum, his representatives should make good the deficiency. The marriage took effect; and on the 9th of January, 1780, the Duke by his will, after confirming the articles, devised all the real estates which he had by the articles agreed to settle, in case he should die without issue male, or in case of failure of issue male in his wife's lifetime, to his wife for life; remainder to his daughters as tenants in common in tail, with further limitations. The Duke afterwards executed a settle-

(e) 2 Ves. J. 417.

ment, by which, reciting the marriage articles, he conveyed the fee to releasees, to the use of himself for life, remainder to trustees to preserve contingent remainders, remainder to other trustees for a term, to raise 2000*l.* per annum for the Duchess, for her jointure, and in bar of dower, remainder to the first and other sons of the marriage in tail male, remainder to the Duke and his heirs.

Upon a view of this case, as above shortly stated, there is an obvious variation in the settlement from the terms both of the articles and the will; and this variation of the interests was much dwelt upon by the Court, to meet the argument of the settlement's being attracted to the articles, so as, by the fiction of relation, to date back, in contemplation of equity, from a time anterior to the will. But from the whole course of reasoning and illustration adopted by the Lord Chancellor, and particularly from what he says in making the application of his general propositions to the facts of the case, *viz.* that "he should be apt to say that this was a conveyance of the whole fee; that the object required it; that it was a disposition that would revoke the will at law; and that *that* Court ought not to determine differently from the rule of law as he had before stated it;" it manifestly appears what would have been his opinion upon the case if there had not been in it the other ingredient of a substantial variance between the will and the settlement.

There seems, therefore, to have been good ground for the concession of the counsel in the case of *Cave v. Holford*, in Chancery; (e) that it is impossible to reconcile *Williams v. Owen* with *Brydges v. the Duchess of Chandos*. The difference, indeed, between a case circumstanced like that of *Williams v. Owen*, (2) and

(e) 3 Ves. J. 684.

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(2) The opinion of the Master of the Rolls, in *Williams v. Owen*, supposes the articles, and the marriage which followed, to have turned

that which the propriety of the decree, according to the professed principle of it, required it to resemble, may be expressed by the contrary propositions of *parting* with the estate and *bringing home* the estate.

In *Watts and Others v. Fullarton*, (f) the testator having previously articed to purchase an estate, became in equity the owner of the estate, from the time of the articles; and having afterwards settled the purchased property by his will, his subsequently taking a conveyance of the estate to a trustee for himself and his heirs, was on solid equitable grounds held to be no revocation; and the trustee would, of course, be seised of the legal estate upon trusts corresponding to the directions of the will.

Lord Bathurst, who decided that case, was said by Lord Mansfield to have relied much on the general proposition laid down by Lord Hardwicke, in *Parsons v. Freeman*, (g) that “where a man has an equitable interest in fee in an estate, and devises it, and afterwards directs a conveyance of the legal estate to the same uses, this is no revocation.” It is evident, however, that this case of *Watts v. Fullarton*, exceeded the bounds of Lord Hardwicke’s proposition, which supposed the legal estate to be afterwards conveyed upon the *same* trusts as directed by the will; and which would be the case of a simple change of the trustee; whereas, in the case last mentioned, the will had settled the estate in a strict form, and the subsequent conveyance from the vendor was for the benefit of the purchaser and his heirs.

By the late case of *Ward and Stanton v. Moore and*

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(f) Stated Doug. 691. 2 Ves. J. 602.

(g) 3 Atk. 741, 749.

all the estates into equitable estates, so that when the conveyance was afterwards made of the legal estate, it was no more than clothing the equitable fee, which had been devised, with the legal estate.

See the reasoning of the Master of the Rolls, in *Harmood v. Oglander*, 6 Ves. J. 218. in explanation of the principle of his opinion in *Williams v. Owen*.

If the owner of an unqualified equitable fee devises it, and afterwards takes a qualified conveyance of the legal fee, such conveyance is a revocation of the will.

**Eboral, (h)** before the Vice Chancellor Sir J. Leach, it was clearly propounded and adjudged, that if the owner of an unqualified equitable fee devise it by his will, and afterwards the unqualified legal fee is conveyed to him, as if, after contracting for an estate, he devises it by his will, and then takes a conveyance of the fee to or in trust for himself and his heirs, the will is not thereby revoked, such conveyance being incident to the equitable fee devised. But if, after such devise of the equitable fee, he takes a qualified conveyance of the legal fee, as if it be conveyed to himself and a trustee for the purpose of preventing dower, such conveyance is a revocation of the will, being a change in the quality of the estate, and not incident to the equitable fee.

The act which succeeded the will in the case of *Watts v. Fullarton* was in effect nothing more than a completion of the contract; and upon the strength of what has been laid down by Lord Hardwicke, in *Parsons v. Freeman, (i)* and confirmed by later authorities, we are warranted in concluding, that if the testator, in this case of *Watts v. Fullarton*, had taken the conveyance to himself and his heirs, instead of taking it to a trustee for himself and his heirs, such conveyance would have been no revocation in equity, and the effect thereof would have been to have made the heir a trustee for the persons taking under the will.

That the change of trustees is no revocation of a will was decided in the case of *Bark v. Zouch, (k)* where A. having made his will, and devised that his feoffees in trust should make a lease to C. and D. for 80 years, at a certain rent, payable to his executors, afterwards procured them to join with him in making a feoffment of the devised hereditaments to new trustees and their heirs, to the use of himself, until he limited new uses thereof, which he never did. It was held that the feoffment was no revocation of his will.

(h) 4 Madd. C. R. 368. (i) 3 Atk. 741. (k) 1 Ch. Rep. 23.

And again, in the case of Doe, Lessee of Sir William Gibbons, *v.* Pott, <sup>(l)</sup> where a mortgagor devised the mortgaged lands, and afterwards payed off the mortgage, and caused a conveyance to be made by the mortgagee of the legal estate to a trustee, in trust for himself and his heirs, such a transfer of the legal estate was held not to operate as a revocation of the will.

But between the two last-mentioned cases there is this observable difference, that in *Bark v. Zouch*, the owner of the equitable estate, after devising it, *joined* in the conveyance from the old to the new trustee; whereas in *Doe v. Pott* it does not appear from the report of the case that the mortgagor was a conveying party in the instrument, whereby the legal estate was transferred to the new trustee. It is probable he was not, having already, and before his will, conveyed his equity of redemption to the trustees of his marriage settlement. It seems, however, that the decision of *Bark v. Zouch* is agreeable to sound equitable principles; since the reason for a will's not being revoked by a mere change of trustees, *viz.* because no estate in equity passes out of, or is acted upon by, the testator, seems equally to hold where the owner of the equitable estate joins with the old trustee in conveying to the new, since such act is as inoperative in equity as at law, except for the purpose of being directory of the intended transfer.

In a case where the first of two wills devised land to trustees upon certain trusts, and the second devised the same lands, together with another piece of land, to the old trustees, with others, but upon the same trusts, the second will was held to be no revocation of the first; <sup>(m)</sup> and, as it should seem, upon the clearest equitable grounds, as there was no substantial *inconsistency* in the devises by the two wills.

The peculiar facts of that case made it important to decide whether the first will was revoked; for though

<sup>(l)</sup> Doug. 710.; and *vid.* per Lord Eldon, 11 Ves. J. 554.

<sup>(m)</sup> 1 Ves. 178. 186. *Willet v. Sandford*.



the second will included all the purposes of the first, yet the statute of mortmain having passed between the making of the two wills, unless the estate could pass by the first it could not pass at all, as being for a charitable object. It is true, the second will devised the legal estate to three new trustees, in addition to the old: but still in respect to the two former trustees, and in respect to the trusts themselves, there was no disagreement. And we may remember that the rule properly understood is this—that a subsequent devise, to revoke a subsisting devise of land, must be inconsistent with such former devise; that the apparent inconsistency must be irreconcilable; and that the first of two wills is, upon the ground of inconsistency, revoked only to the extent of the inconsistency.

Revocation in equity by articles to sell for valuable consideration.

Equity holds a very steady course in respect to these revocations of wills by subsequent alienations, applying the rule of law to those interests which are looked upon as the estate itself in equitable consideration, and to equitable purposes, in such manner as to keep the decisions of law and equity, in this respect, the same in principle. Thus, it being the maxim of equity to treat an estate which has been articulated to be conveyed by the owner to a purchaser for valuable consideration, from the moment the articles are executed, as vested in the purchaser, and therefore as capable of passing by his will, if properly executed, (n) and the subsequent conveyance of the legal interest as having no effect upon the will, being only the medium of carrying the estate home; in accordance with these views, that Court considers a devise of land to be revoked by subsequent articles to convey or settle the devised premises for valuable consideration: for if the estate, after the articles are executed, is to be regarded, as vested in the purchaser, it ought to be regarded as passing by the same act out of the vendor or settlor;

(n) See the case of *Broome v. Monck*, 10 Ves. J. 604. that an equitable title acquired after a general devise passes by republication.



and therefore, by a plain consequence of this rule of equity, a testator by a subsequent covenant for valuable consideration to sell or settle the devised estate, must be held to have revoked a prior testamentary disposition.

Thus, where (o) a testator devised to his wife six houses in bar of dower, and the rest of his real estate to his two daughters and their heirs, in moieties; and afterwards, in consideration of the marriage of his eldest daughter, by marriage articles covenanted to settle one moiety of his real estate to the use of himself for life, remainder to the husband and wife for their lives, remainder to the younger children of the marriage in tail general, remainder to the husband in fee; Lord Chancellor King held that although it was but a covenant, and therefore at law no revocation of the will; yet that the same, being for valuable consideration, was in equity tantamount to a conveyance, and consequently a revocation of the will, as to the six houses devised to the wife; so that the husband was entitled to one clear moiety of the rents of the estate from the death of the testator. The same doctrine was again laid down by the same Chancellor in a subsequent case; (p) and has since been confirmed by the learned Lord, who now presides in the same Court, (q) and by Sir William Grant. (r)

(o) *Sir Barnham Rider v. Sir Charles Wager et al.* 2 P. Wms. 328.

(p) *Cotter v. Laver*, 2 P. Wms. 624.

(q) 6 Ves. J. 654. (r) *Vawser v. Jeffrey*, 16 Ves. J. 519.

## SECT. III.

*Mortgages, and Conveyances for payment of Debts.*

MORTGAGES in fee are differently regarded in the Courts of common law and those of equity. At law they are total revocations, but in equitable consideration they are only revocations *pro tanto*. (1) It is not on the ground of the particularity of purpose that a mortgage in fee is in equity held to be only a revocation *pro tanto*, though the distinction between the practice of Courts of equity and law have been often incautiously put upon that ground: but the true reason arises out of the distinct considerations under which mortgages pass in Courts of law and Courts of equity.

In equity, conveyances by way of mortgage, or for payment of debts generally, are only revocations to the extent of the charge.

A Court of law can only look to the legal operation of the deed, whereby the testator, by conveying out of himself his legal estate, of necessity must be held to revoke a previous disposition by will of the same estate; but in equity the transaction has another aspect, and is only regarded as a security for the debt; the deviser remains complete owner, as before, of the estate, subject only to the security, which in the contemplation of equity is nothing but a chattel. And, upon the same principle, if after a devise, the testator makes a conveyance of the whole fee, upon trust to sell and pay

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(1) And if the mortgage be by deed and fine, it is nevertheless said to be a revocation only *pro tanto* in equity, 2 P. Wms. 334. per Lord Chancellor King. But according to Viner, tit. Devise (P) pl. 10. it was held by Lord Cowper, 6 Ann. that if a man devises lands, and afterwards mortgages the same for years, and then levies a fine *sur cognizance de droit come ceo*, and not a fine *sur concessit*, this will be a revocation; but that a fine *sur concessit* would have revoked only *pro tanto*. It is a critical question whether the principle upon which Courts of equity consider mortgages as only revocations *pro tanto* does not reject this distinction.

debts; the interest of the testator (2) is only affected to the extent of that incumbrance. To that extent the will is revoked: but the equitable estate in the subject of the devise remains unaltered, except in so far as it is become charged with such debts; and therefore if, after such deed of conveyance, the legal estate in the remaining part of the property, when the object of payment of debts has been satisfied by the disposition of part, is taken back by the testator, by a reconveyance to himself and his heirs, his will is unrevoked in equity. (a)

The late Lord Alvanley (3), when sitting as the Master of the Rolls in the case of *Harmood v. Oglander*, states the criterion for ascertaining when equity will interfere with the law in respect to the revocation of wills by subsequent conveyances, and to what ex-

(a) Vid. *Harmood v. Oglander*, 6 Ves. J. 221.

(2) It is to be observed, however, that if A. devises lands to his executors to be sold for the payment of his debts, and then conveys it to trustees for the payment of debts, the devise is revoked. 2 Ch. Ca. 116.

(3) It would be a sort of injustice to that learned Judge to omit this opportunity of introducing to the Reader the ingenious vindication which, in the course of his judgment in this case, he makes of his decision and doctrine in the case of *Williams v. Owen*. "If," says he, "instead of articles, the testator had, before the marriage, conveyed to a trustee, in trust for himself till the marriage, then for himself for life, remainder to the issue in tail, remainder to himself in fee, and then made the will, and then had called upon the trustee to convey, and he had conveyed, it is admitted that *that* would have been a complete revocation in law; but as clearly it would not have been a revocation in equity, and the heir must have conveyed to the uses of the will. In principle that does not differ from the case of *Williams v. Owen*. There the deviser was bound by the articles, and he might have been compelled to convey accordingly. Then it is strange to say, that if a conveyance were taken from a trustee, it would be no revocation: but if, according to his obligation, he himself conveyed to the same uses, it would be a revocation. No one can deny that articles are in equity equal to a conveyance. No one can deny that he remained a trustee to the use of the articles, and must have conveyed accordingly." But see *supra*, page 274.

Lord Alvanley's defence of *Williams v. Owen*.

tent, with great pains, and in a manner which shews that the doctrine is not grounded on the particularity of the object of the deed. He lays it down as a primary rule of law, that “any alteration of the estate, or a new estate taken, is at law a revocation, whether for a partial or a general purpose: equity never controuls the law upon revocation, except either where the beneficial interest, being distinct from the legal estate, is devised, and the deviser if he afterwards takes the legal estate, takes it without any modification or alteration; or where, having the complete legal and beneficial estate at the date of the will, he divests himself of the legal estate, but remains owner of the equitable interest, as in the case of a mortgage, or a conveyance for the payment of debts.”

In the above case of *Harmood v. Oglander* the object of the intended recovery was a mortgage; it was therefore for a partial purpose, but that alone could not save it; and although, if it had been a simple conveyance of the fee by the way of mortgage, it would have been only a revocation *pro tanto*; yet the mode of effecting this intention being by recovery, with double voucher, which in equity as well as law proceeds upon a previous conveyance of the whole estate from the owner to the tenant to the *præcipe*, to be recovered out of him by the demandant, from whom a new estate is to be taken, the will was held to be clearly revoked; and this although the recovery was not, in fact, proceeded in further than the conveyance to the tenant to the *præcipe*.

The true ground on which mortgages in fee are considered in Equity as only revocations *pro tanto*.

In *Sparrow v. Hardcastle*, as that case is reported in a note to *Goodtitle v. Otway*, in the reports of Messrs. Dornford and East, (b) Lord Hardwicke intimates the true ground on which mortgages in fee are considered in Equity as only revocations *pro tanto* of a will. “The principal ground,” says his Lordship, “on which they put this case is, that this grant was

(b) Vid. 7 T. R. 417.

intended only for a particular purpose, and that when that purpose was answered, the estate was not intended to be altered, but to remain as before; and this was compared to a mortgage. The reason why mortgages are taken to be out of the general rule is this. It does not depend on the general ground insisted on at the bar of being conveyances for a particular purpose, (4) but on the foot of being securities only. Whether the mortgage be in fee or for years only is all one in this Court; they are alike considered as chattel interests. A mortgage in fee goes to the executors, (for whom the heir is only a trustee), supports no dower, and has no one property of a real estate."

So that, upon an accurate consideration of this point, we shall perceive nothing in it which breaks in upon the maxim of *equitas sequitur legem*. The truth being that when an estate is charged or mortgaged, a Court of Equity does not regard the estate as any way passed, modified, altered, or affected. (5) The same doctrine

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(4) In *Harmood v. Oglander*, Lord Eldon gives full confirmation to this opinion. That case was decided for the entire revocation both at law and equity, on the ground of there being uses declared upon the recovery beyond the mere purpose of the mortgage. But wherever a recovery is necessary, the estate must undergo an alteration thereby: and therefore if a tenant in tail makes a mortgage, and for that purpose suffers a recovery, and declares the ulterior use to himself in fee, the estate is altered, and the will is clearly revoked. See 8 Ves. J. 106.

(5) An equity of redemption imitates more closely the legal estate than a mere trust. See the notice taken of this distinction in *Burgess v. Wheate*, 1 Blackst. 145. and see Sir Matthew Hale's definition of a mortgage, Hard. 469. Pawlet's case. So Lord Nottingham, (MS.) says, an equity of redemption charges the land, and is not a trust. Blackst. 145. The estate of the mortgagor is not a mere trust, but a *title* in equity. In a word, the equity of redemption is in equity the fee simple of the land; and by consequence, after foreclosure, the mortgagee is considered as acquiring a *new* estate. But if it be a mortgage for a term of years only, and the equity is foreclosed, or released, after the will, the new interest may pass under the general words of the residuary clause; for the equity which is so gained by the release or foreclosure is the interest in a chattel only, and therefore may well pass by the prospective operation of the residuary devise, if sufficiently comprehensive in expression.

Difference between an equity of redemption and a mere trust.

is carried to a trust for payment of debts ; so that the resulting beneficial interest upon a trust to pay debts is not in the view of a Court of Equity a suspended or springing interest to arise upon a future event, but a present vested estate subject to such trust as a mere charge. (6)

By the bankruptcy of the testator, the will is not revoked as to the surplus.

The principle has received a still further extension in a late case, (*d*) in which it has been held that the devise of real estate is not revoked by the bankruptcy of the testator. The question could, of course, only regard the surplus, which in that case remained after payment of all the bankrupt's debts. And it was contended in behalf of those who claimed under the will that a bankruptcy was only in effect a conveyance for divesting all the property of the bankrupt merely to make it subservient to the object of paying his debts ; so that there was no sound distinction between the case of a mortgage, or a general conveyance for payment of debts (which has the effect of a charge only with a resulting trust as to the surplus) and a conveyance by operation of law for the same purposes. The Court in its decision of the case dropped something in reference to the partial and particular purpose of the conveyance under the bankruptcy : but this seemed only to have been adverted to for the sake of pointing out the distinction between bankruptcy and disseisin.

(*d*) *Charman v. Charman*, 14 Ves. J. 580.

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(6) There is no difference between a charge for a particular debt, and a general charge for debts. Though the whole is directed by the subsequent conveyance to be sold to pay debts, yet the surplus is to be paid to the devisee of the estate by the previous will. 2 Vern. 295. *Ogle v. Cook*, 1 Wils. 310. where Lord Hardwicke expressed his approbation of that decision, and see *Lady Vernon v. Jones*, 2 Vern. 241. But where a man directs the surplus to be paid to his executors and administrators, this seems to be a converting of the land into personalty, and so the subject of the devise is specifically destroyed. See 2 Ves. J. 436. Where a man after making his will conveys in trust for himself, the will is revoked in law and equity ; though there is a case in which a deed of trust made by a melancholic person by way of caution has been held no revocation. *Coles v. Hancock*, 2 Ch. Rep. 210.

## SECT. IV.

*Partition.*

**PARTITIONS** stand upon a different foundation from mortgages or conveyances in trust to pay debts : but they are not more referrible than mortgages to any supposed distinction between conveyances for general and particular purposes. There could not be a more particular purpose than that in *Luther v. Kidby*; (a) and had this been a sufficient ground, the Chancellor would not have sent it to a Court of law.

In neither of the cases *Luther v. Kidby*, or *Risley v. Lady Baltinglass*, (b) is any thing said of a special purpose. Whenever the question concerning revocation by partition has come under consideration, it has been taken for established law, and has been said to stand on peculiar grounds : but those grounds have generally been left unexplained. And though Mr. Justice Buller, in the case of *Goodtitle v. Otway*, (c) observed that cases upon partitions generally happen in equity, he was compelled to admit that, long previous to *Luther v. Kidby*, it was established at law that a partition was not a revocation of a will.

Established law  
that partition is  
no revocation.

It is not very easy to reconcile the cases upon partition to the principles which have usually governed in the cases of revocation. (1) It may be a reason

(a) 3 P. Wms. 170. Note to the first edition, 8 Vin. 148. pl. 30.

(b) Sir Thomas Raymond, 240.

(c) 2 H. Blackst. 525.

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(1) Tenants in common after partition take the same estate as before, though in another mode, Vid. post. 346. But the partition among joint-tenants has the effect of altering the estates of the parties. In the case therefore of joint-tenants, the points of enquiry are the reverse of those which come into question in the case of tenants in common. Where a tenant in common having devised his estate makes a partition, the question it has given rise to has been, whether the devise was revoked by the partition. But where one of two

Difference between tenants in common, and joint-tenants, as to the effect of partition.



Where there is any other purpose declared besides the mere purpose of the partition, the will is revoked.

for this doctrine, that the party is compellable by process of law to make partition ; and that an act thus imposed upon a party has upon such ground of compulsion been held not to disturb his previous dispositions by will. And it is remarked by Lord Hale, in his commentary on the writ *De Partitione facienda* (2), that the writ is brought to ascertain the possession, and the legal estate is not affected. The courts seem to have been careful, however, not to extend this allowance to any case where any thing is done beyond the dry purpose of partition ; for where in *Tickner v. Tickner*, cited in *Parsons v. Freeman* (d), the deed limited the moiety, in the first place, to such uses as the testator should appoint ; and in default of appointment to him in fee, Lord Chief Justice Lee, who had signed the certificate in *Luther v. Kidby*, held that the slight variation by the introduction of the power made it a revocation.

Mr. Justice Heath declared it to be his opinion (e) that “ the cases of *Luther v. Kidby*, and *Tickner v. Tickner*, were difficult to be reconciled with some of the other cases, and with each other. That the only difference between them was the power of appointment in the latter ; and, that though the execution of the power would be a revocation of the will, yet that the mere reservation of the power ought not to

(d) 3 Atk. 742.

(e) 3 Ves. J. 666.

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joint-tenants has made a will devising his moiety, and a partition has afterwards taken place, the question has been whether the will has had effect given to it by the partition ; the affirmative of which question could only be maintained on the notion that at the time of making his will, the testator, as such joint-tenant, had an interest in its nature devisable, but which was prevented from passing as such by being intercepted and supplanted by the *jus accrescendi*. But it has been determined that a joint tenant is under an original incapacity to devise his moiety, being not comprehended within the statute of wills, which being an enabling statute, whatever is not included in it remains as at common law. *Swift v. Roberts*, 3 Burr. 1491.

(2) Fitz. Abr. 142. and see a note of this case produced by Lord Loughborough, in 2 Ves. J. 432.



have that effect." Buller, Justice, in the same case said, that the case of partition was a case *sui generis*. If the partition was by writ against the wish of the testator it was no revocation ; and it was but one step more to hold that the same thing by deed or fine should not have a different effect. The authority of *Luther v. Kidby*, as far as it is an authority only goes to this, that there is no difference in effect whether the partition by fine be in pursuance of a covenant, or of a writ of partition : but the Court did not mean to lay down a rule applicable to any other case. Taking the whole together, it seems, said that learned Judge, as if it was thought that there was a difference between a fine for a partition and any other purpose. He agreed with Heath, J. that there was no material difference between *Luther v. Kidby*, and *Tickner v. Tickner* ; for, notwithstanding the power of appointment, the fee vested in the testator, and then the deed and fine were the sole ground of revocation in that case ; and if so, it was in direct contradiction to *Luther v. Kidby* ; and the report of *Parsons v. Freeman*, in Ambler, shews it was so considered, for Lord Hardwicke approved of *Tickner v. Tickner*, and said it was the same case as that before him (3)."

We find no earlier notice of this question as to the revocation of a will by a deed of partition, than that of *Lestrangle v. Temple*, in Siderfin, (*f*) where a quære is made whether, if one holding lands in common with another makes his will and devises all his lands, and afterwards makes a partition by agreement, and not by writ, the partition is a revocation. Soon afterwards, in

(*f*) P. 90.

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(3) But as that case is reported in Atkins, a better Reporter, Lord H.'s observation was that *Tickner v. Tickner* came very near the present ; it was not merely to effectuate a partition, but for another purpose ; and therefore Lord C. J. Lee held it amounted to a revocation ; and I am, said his Lordship, for the same reason, of opinion that the recovery here is also a revocation.

the case of *Temple v. Webb*, (g) tenant in common of a manor devised all his interest in the manor, and then a partition was made, and a fine levied to corroborate the partition; and the question being, whether this partition and fine were a revocation or not, they were adjudged to be no revocation. And the Judges are said by the Reporter to have entertained the same opinion, (though no judgment was given) in *Risley v. Baltinglass*. (h)

*Luther v. Kidby* (i) was thus: A. and B. were tenants in common of lands in fee-simple. A. by his will dated 25th January, 1719, devised his moiety in fee; afterwards A. and B. made partition by deed dated 16 May, 1722, and fine, declaring the use as to one moiety in severalty to A. in fee, and as to the other moiety in severalty to B. in fee. This case was sent by Lord Chancellor King to the Judges of the King's Bench for their opinion, whether the will was revoked, and it appears by the Register's book, that that Court composed of Lord Raymond, C. J. Page, Probyn, and Lee, justices, certified,—“that they were all of opinion that the will of the said A. was not revoked by the deed and fine levied in pursuance thereof; and that the said A.'s share of the lands contained in the deed, and the fine levied thereon, did pass by the will of the said A.,” with which opinion the Lord Chancellor concurred.

About 20 years afterwards, Lord Chief Justice Lee, who had signed the certificate as puisne Judge, in *Luther v. Kidby* or *Kirby*, decided the case of *Tickner v. Tickner*, which was as follows: (k) Robert Tickner, seised in fee of the estate in question, which was of gavelkind, died intestate, and left two sons, Henry and Robert, who entered, on his death, and became seised,

(g) *Freem. Rep.* 542. pl. 735. *Vin. tit. Dev.* (R. 6) in the Notes.

(h) *Sir Thomas Raym.* 240. in the Exchequer.

(i) *Vin. tit. Dev.* (R. 6.) pl. 30 1730. and see 3 P. Wms. 162. Note by the Reporter.

(k) Cited in *Parsons v. Freeman*, 3 Atk. 742.

in gavelkind. Robert being possessed of an undivided moiety made his will, and devised it to his wife Elizabeth Tickner and her heirs. After this will of Robert, by a deed of partition between Robert and Henry Tickner, and by a fine, all the gavelkind lands were divided, and Robert's share was allotted to him to such uses as he should appoint by deed or writing, and in default of such appointment to him in fee. A verdict was found in ejectment, subject to the opinion of Lord Chief Justice Lee, who, after mature deliberation, held the transaction to be a revocation of the will.

The doctrine in respect to the question of revocation by partition is founded upon the foregoing cases; but it has been shewn that a part of the Bench, in the discussion of the case of *Goodtitle v. Otway*, doubted of the principle on which *Luther v. Kidby* was determined; and considered that case, and the case of *Tickner v. Tickner*, though the Judge who concurred in the one decided the other, as irreconcilable.

Great legal opinions on the propriety of the decisions in *Luther v. Kidby*, and *Tickner v. Tickner*.

To Lord Chancellor Loughborough both these cases appeared to be rightly and consistently determined; and this opinion was expressed by him in a judgment which displayed, in language and argument the most graceful and luminous, his deep acquaintance with the whole subject and its principles. (1) Speaking of *Luther v. Kidby*, his Lordship observed, "It was sent to law; and the Court of law being of opinion, and wisely, that it was not a revocation, this court determined in conformity to the law, following the law." But where the object of the deed went further than a mere partition by conveying the estate to such uses as the party should appoint, Lord Chief Justice Lee held it an alteration in the estate, and that it would not pass by the will at law; and Lord Hardwicke has given his sanction to that authority, and would not determine against the rule of law.

Opinion of Lord Loughborough.

(1) Vid. *Brydges v. the Duchess of Chandos*, 2 Ves. 429.

Lord Eldon's  
opinion.

The present Chancellor, in a case determined by him in 1802, has recognized the law upon these two cases of *Luther v. Kidby*, and *Tickner v. Tickner*, to stand thus : “ That mere partition, whether by compulsion or agreement, is not a revocation of a will ; but the slightest addition, as a power of appointment prior to the limitation of the uses, is sufficient.” (m) And again, in another case decided by him in the ensuing year, his Lordship put the seal of his high authority upon this much agitated question. “ The case of partition,” said his Lordship, “ is a sort of special case. Each party can compel the other to make partition ; the estate is the same, though enjoyed afterwards in a different quality, and in another mode : and upon a principle compounded a little of those two reasons, it has been held that that which can be compelled, if done voluntarily, and provided nothing more is done than mere partition, shall not revoke the will. I say, provided nothing more is done ; for it has been long established, that if the object is to do any thing beyond the partition, it will be a revocation. It is tried by the fact whether the acts demonstrate any intention to go beyond the mere partition : and notwithstanding the expressions of the Judges in some of the reports, that *Luther v. Kidby*, and *Tickner v. Tickner*, cannot stand together, they have stood together a considerable time, and in my opinion are perfectly reconcilable.” (n)

But a will may  
be so confined  
in terms as to  
be of necessity  
revoked by  
partition.

One distinction upon this subject it is very necessary to recollect :—That if the manner in which the partition is made destroys the interest of the testator in the thing given, so that at his death there is nothing in him to answer to the description of the specific subject of the devise, it must follow, notwithstanding the rule that the mere partition is not a revocation, that the devise is revoked, since it cannot operate ; the thing being withdrawn upon which it was to operate. Thus if A. seised as a tenant in common, or coparcener, of

(m) 7 Ves. J. 564.

(n) 8 Ves. J. 281.

a moiety of two estates, the one in Berkshire, and the other in Lincolnshire, devises his *Berkshire estate in terms*, and then by a partition between himself and his co-proprietor B., the Berkshire estate is allotted wholly to B., and the Lincolnshire estate to A., the devise is of necessity revoked. (o)

(o) See the case of *Knollys v. Alcock*, 7 Ves. J. 558.

## CHAP. III.

## REVOCATIONS IMPLIED FROM SUBSEQUENT ACTS.

## SECT. I.

*Subsequent Marriage of Testator.*

The general rule is, that marriage and the birth of a child is an implied revocation as well of a will of real as of personal estate.

AMONG implied revocations, and as such, not falling within the statute of Frauds, is that which is produced by a subsequent marriage and the birth of a child or children, on which point the case of *Lugg v. Lugg* (1) is said to have been the first affirmative decision. The point appears to have been afterwards doubted, but was at length recognized as a rule of law, (a) though it received no adjudication as to real estate till the case of *Christopher v. Christopher* was determined in the Court of Exchequer in 1771. (b) It appears from the report in *Ambler*, of *Parsons v. Lanoe*, that Lord Hardwicke entertained doubts as to the applicability of this rule to real estate: but it has since been carried to that extent, if that could be said to be

(a) *Brown v. Thompson*, 3 Eq. Ca. Abr. 413. *Parsons v. Lanoe*, 1 Ves. 189. *Ambler*. 557.

(b) See 4 Burr. 2171, 2182. *Dougl.* 35.

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(1) 2 Salk. 592. 1 Lord Raym. 441. by the delegates, among whom was Lord Chief Justice Treby.

extending the rule which was no enlargement of its principle ; for there seems to be no foundation for saying, that the presumption on which it grounds itself is less applicable to one description of estate than another. (2)

The general rule was admitted in *Brady, lessee of Norris, v. Cubitt* ; (c) the Chief Justice at the same time observing that in his recollection there was no case in which marriage, and the birth of a child, had been held to raise an implied revocation, where there had not been a disposition of the whole estate. (3) In the last-mentioned case, Lord Mansfield expressed great doubt whether the circumstances of the case were such as would raise the presumption, the testator having, in contemplation of his marriage, settled 800*l.* a-year upon his intended wife ; so that he not only contemplated the change in his situation to take place after his will, but actually provided for it, as to his wife, by his will ; and his Lordship appears to have considered the

Lord Mansfield's doctrine in respect to the admissibility of extrinsic evidence to rebut the presumption.

(c) Dougl. 31.

(2) It appears that the rule under consideration was borrowed from the civil law ; and incorporated into our law, with some hesitation, and by very gradual adoption. Lord Kenyon has remarked that a very able lawyer, Mr. Justice Perrott, dissented from the decision in *Christopher v. Christopher*, lest the statute of Frauds should be thereby repealed and having a jealousy of introducing the civil law, he resisted the force of those arguments which found their way to the other Judges who determined that case. But his Lordship added, he was glad those Judges did over-rule his opinion, because no person could wish that his family should be put into such a situation as to be deprived of all provision, and that the secondary objects of his bounty should be preferred to his immediate children. 5 T. R. 58.

Adoption of the rule.

(3) Lord Mansfield's doctrine does not appear to have been acted upon, and yet many difficulties must follow a different construction of the rule ; for if it is applicable to cases, where the marriage and birth of a child were not preceded by a total disposition, it must either depend upon a fluctuating consideration of what was enough for the family in each case ; or if every partial disposition, however small, is to be revoked by these events, then it must rest upon this proposition, viz. that every man who marries, and has issue, must necessarily mean all he has in the world to become theirs.

Whether the previous disposition of the whole estate is necessary to ground the application of the rule.

rule as flexible to the particular circumstances of each case, and standing only on a presumption of fact, which, like all other presumptions of the same kind, might be rebutted by every sort of evidence. According to this view of the principle of the rule, the facts of the case were admitted to furnish a counter-inference to the presumption of the rule, which was made to give way; and the will was adjudged, upon these grounds, to be unrevoked by the subsequent marriage, and birth of a child.

The principle of the rule according to Lord Kenyon.

In subsequent cases the rule has been considered as standing upon firmer ground than a mere presumption of fact. In *Doe v. Lancashire*, (*d*) Lord Kenyon was of opinion that the foundation of the principle was not so much a presumed intention to alter the will, implied from the circumstances afterwards happening, as a tacit condition annexed to the will itself at the time of making it—that the party does not *then* intend that it should take effect if there should be a total change in the situation of his family. And Lord Alvanley, in *Gibbons v. Caunt*, (*e*) expressed a disapprobation of the practice of receiving parol evidence to rebut the presumption, which he seemed to think should be considered as inevitably arising from the subsequent marriage and birth of a child.

The decision in *Christopher v. Christopher* went a little beyond former cases, not only in carrying the rule to *real estate*, but in applying it also to the case of a second marriage with children, where there were no children of the first marriage.

Whether a will is revoked by the birth of more children by a first marriage after the will, and a second marriage without children.

By the case of *Gibbons v. Caunt*, (*f*) it was left a question, and so it still remains, whether, if a testator has more children by a first marriage born after the date of the will, and becoming a widower marries again, and has no child by the second wife, the will is revoked. Lord Alvanley, however, observed that there was not a single argument applying to the feelings of mankind,

(*d*) 5 T. R. 491.

(*e*) 4 Ves. J. 848.

(*f*) 4 Ves. J. 840.



that did not apply as much in the case before him as in the simple one of a subsequent marriage, and the birth of a child.

It was held, however, in the well considered case *ex parte* the Earl of Ilchester, (g) that a second marriage and the birth of children, *where the wife and children were provided for by settlement*, and there were children by the former marriage, which was before the will, was a case of exception to the rule in question; and the will in that case was held not revoked. And this decision appears to strengthen what was observed by Lord Mansfield, in *Brady v. Cubitt*, on the testator's having in his contemplation, at the time of making his will, the provision for his intended marriage; and seems to favour the doctrine of founding the principle of these cases rather upon presumption from intention, than a fixed and permanent rule of law.

The Lord Chancellor, in the case last adverted to, disclaimed the adoption of any general principle, and professedly decided the case before him upon its own particular circumstances. He thought it better to express his opinion in terms of exclusive applicability to the case, by declaring that under all the circumstances belonging to it, he thought that the appointment was not revoked by the subsequent marriage and birth of children.

The case of *Doe v. Lancashire*, (h) was that of a subsequent marriage, and the birth of a posthumous child; and the point there was, whether the circumstance of the child's being born after the death of the testator, took it out of the rule that marriage and the birth of a child are a revocation of a will. The argument principally relied on against the revocation was this, *viz.* that at the death of the testator, and before the birth of the child, one of the circumstances which composed a case falling directly within the rule was wanting; and the decision respecting the validity of

A subsequent marriage and birth of a posthumous child operate as a revocation.

(g) 7 Ves. J. 348.

(h) 5 T. R. 49.

the will ought then to be made, as if the question had arisen during the interval between the death of the testator and the birth of his child; for the will could not be valid at the testator's death, and rendered invalid by subsequent extrinsic circumstances. Suppose the child had never been born alive, and the marriage and pregnancy had been held to be an implied revocation, all the devises in the will would then have been revoked in favour of a person who never came into esse. The greatest presumption that could be raised from the wife's pregnancy would be an intention to revoke when the child should be born. But a declaration of an intention to revoke a will at a future time was not sufficient even before the statute of Frauds; it must be a present purpose. (i)

But this reasoning was met by Lord Kenyon's exposition of the principle of the rule, viz. that it does not so much depend upon the presumption of intention, as on the notion of a tacit condition (4) annexed by legal construction to the will, that in such an event the will should not stand. In support of the decision may be added also the fiction of law, that the instant the child is born, he is considered by *retrospect* as born during the parent's life; which doctrine is referrible to the civil law from which the rule itself was originally borrowed, and from which it may therefore with propriety receive its explanation. (5)

(i) *Cranwell v. Saunders*, Cro. Jac. 497.

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(4) A man may make a conditional or contingent will: as where a testator, on the eve of going abroad, says, "In case I die before I return, I bequeath so and so," the will is avoided by his return. Ambl. 557. *Parsons v. Lanoe*.

(5) Vin. lib. 2. tit. 13. The will is good until the child is born, *quam diu quis in utero est, proprie nondum homo vel animal est*. But the moment he is born *testamentum rumpit; tunc enim fictione juris, natiuitas retrahitur*. See also what his Lordship observes as to the notice which is taken by our law of posthumous children; as where a father dies leaving a daughter, and his wife ensient, and a son is afterwards born, though the lands descend to the daughter in

Mr. Justice Grose forcibly observed, that he knew of no argument founded on law and natural justice, in favour of the child who is born in his father's lifetime, that did not equally extend to a posthumous child. And Mr. Justice Buller relied on the cases in our own law, which have decided that a posthumous child is to be considered as in the same situation as one born during the parent's life. He said that all the cases cited by the counsel for the plaintiff, as well as that of *White v. Barber*, (6) established the point that there was no dis-

the interim, yet the instant the son is born the descent shift to him. See *Co. Litt.* 11. 6. His Lordship added, that under the statute 10 and 11 W. 3. c. 16. the law considered posthumous children as entitled to take: but the misfortune was that if there were no trustees to preserve contingent remainders, that which was good in its inception, might be afterwards defeated by the child's not being *in esse* when the particular estate dropped: but that was founded on technical reasoning, because the particular estate failed before the remainder could take effect. See the note by Mr. Serjeant Williams, to *Purefoy v. Rogers*, Saund. 387. n. 7.

(6) 5 Burr. 2708. *Doe v. Clark*, 2 H. Bl. 399. It seems to be well established that under a devise to children living at the testator's death, a child *en ventre sa mere* shall take. *Hale v. Hale*, Prec. in Ch. 50. *Beale v. Beale*, 1 P. Wms. 245. *Miller v. Turner*, 1 Ves. 85. *Clarke v. Blake*, 2 Bro. C. C. 326. Though there are some cases to the contrary, *Pierson v. Garnett*, 2 Bro. C. C. 38. *Cooper v. Forbes*, 2 Bro. C. C. 63. If one devises, in case he leaves no son at the time of his death, to J. S.; and dies leaving his wife *præsent* with a son, this posthumous son is a son living at the testator's death, and J. S. is consequently not entitled. See Sir Rob. Burdett v. Hopegood, 1 P Wms. 485. So a posthumous child takes under the statute of Distributions, 2 P. Wms. 446. *Wallis v. Hodson*, 2 Atk. 117. Thus also if a power be created for charging lands for portions for younger children, living at the father's death; a child *en ventre sa mere* is a child within the power. *Beale v. Beale*, 1 P. Wms. 244. It is said, also, that a posthumous child may be vouched, *Co. Litt.* 390. If the mother takes poison with intent to poison it, and the child is born alive, and afterwards dies of the poison, it is murder by the common law. 3 Inst. 50, 51. As to the intermediate profits, Lord Hardwicke, in the case of *Bassett v. Bassett*, 3 Atk. 203. held, that a posthumous son, claiming under a remainder in a settlement, was by construction of the 10 and 11 W. 3. c. 16. entitled to them: but in the same case he seems to have taken it for granted.

Statute 10 and 11 W. 3 c. 16. concerning children *en ventre sa mere*

inction between a child *en ventre sa mere*, and one actually born. He would add, he said, one to them from 1 Ves. 85. where on a bond given on marriage to raise 2000*l.* for such child or children of the marriage, *as should be living* at the death of the father or mother, a posthumous child was held entitled to take as coming within the description. Upon these reasons the Court gave judgment for the revocation. (7)

Marriage and the birth of a child must concur, and both events must take place after the will to produce a revocation.

It seems, therefore, to be well settled that marriage, and the birth of a child, are by operation of law a revocation of a preceding will. And it appears to be with equal certainty settled, in the case of real estate, at least, that both these circumstances must happen to produce such a consequence.

In *Ward v. Phillips* a will was found which gave every thing to the widow. A posthumous child being born, a suit was instituted in the Ecclesiastical Court, to set aside the will ; and the Court having decreed against the will, that decree, on appeal to the delegates, was reversed. Dr. Hay, in commenting upon the case observes, that on the side of the first decree it was objected by Dr. Calvert,

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that on a descent the mean profits belong to the intermediate possessor ; for he directed that the profits of the estate descended should be accounted for by the uncle, only from the birth of the posthumous child. In *Co. Litt.* page 55, b. Lord Coke says, “ If a man seised of lands in fee hath issue a daughter, and dieth, his wife being ensient with a son, the daughter soweth the ground, the son is born ; yet the daughter shall have the corn, because her estate is lawful, and defeated by the act of God.” From which it is to be inferred that Lord Coke did not consider the posthumous child as entitled to any mean profits upon a *descent*. And Lord C. J. De Grey, in 2 *Wils.* 526. on a question whether a posthumous son was actually seised, denies that the posthumous son, in the case of descent, can be entitled to any profits received before his birth, and cites 9 *H.* 6, 25. as an authority in point. See Mr. Hargrave’s note to *Co. Lit.* p. 11. b.

(7) The Court agreed in disclaiming any attention to the declarations of the husband, because letting in that kind of evidence would be in direct opposition to the statute of Frauds, which was passed in order to prevent any thing from depending either on the mistake or the perjury of witnesses.

that as marriage alone did not revoke a bachelor's will, but required the additional consideration of the birth of a child, the birth of a child, or children was to be taken as the essential and operative circumstance, and ought to revoke a married man's will; and for this construction he relied on the case of *Jackson v. Hurlock*, before Lord Northington; but that case went no further than to recognize the rule that marriage without issue did not revoke a will, which said Dr. Hay, was before established by many cases; but by no means followed from thence that the birth of children would affect a married man's will.

It was further objected, continued the learned Doctor, that in the Roman law, by which we proceed in this Court, the birth of children operated as a revocation of a precedent will. This is rightly stated from the Roman law; and it is true that the Roman law in general guides our decrees; but it guides our decrees no further than where it stands uncontradicted by the English law. In the former, children are considered as having a property in the effects of the father: but in our law we know of no such thing, and therefore the effect of the birth of children must be very different. (8)

Upon the whole, it appears that the general rule laid down in *Lugg v. Lugg*, before mentioned as the first of this class of cases, *viz.* that where the revocation depends upon the alteration in the testator's circumstances, it must be a *total* alteration, has been acknowledged in all the Courts. And that *total* alteration is made to consist in the combination of the two facts of marriage and the birth of a child or children.

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(8) See Doctor Hay's judgment in *Shepherd v. Shepherd*, 5 T. R. 51.; wherein after stating it to be an incontrovertible position, that marriage alone would not revoke, he added, that so the birth of children would not revoke unless under very special circumstances. And see further as to what special circumstances will give to the birth of a child or children this effect, in the Chapter on the Revocation of Personal Estate.

But Dr. Hay, in the above-mentioned case, seemed also to think that there might be such a *total ignorance* in a testator of his real situation as might occasion some doubt; according to the case put by Cicero, in his *De Oratore*, and which has before been mentioned as applicable to our law on the same subject: *Pater credens filium suum esse mortuum, alterum instituit hæredem, filio domo redeunte, hujus institutionis vis est nulla.* But it has also been before observed that by the Roman law the children were considered as having a sort of inchoate property in the effects of the parent. Unless the testator shews by the context or expression of his will the existence of such total mistake or ignorance, or professedly grounds his testamentary disposition upon facts which he can be shewn to have mistaken, it should seem very strong to say, since the statute of Frauds and Perjuries, that any extrinsic evidence can be admitted to prove the intentions of the testator, for the purpose of *overthrowing* his will. Where the will itself, coupled with the facts, shews the mistaken apprehension on which the devise has been grounded, the case falls within the principle of *Campbell v. French*, already cited. (k) And to a case so circumstanced perhaps the principle on which Lord Kenyon seemed in great part to ground his opinion in *Doe v. Lancashire*, may seem to apply; for there appears to be a sort of tacit condition annexed to, or accompanying in legal consideration such a devise, that if the facts were otherwise than apprehended by the testator, the devise should not stand.

(k) 3 Ves. J. 321.

## SECT. II.

*Subsequent Marriage of Testatrix.*

ALTHOUGH the general rule is that marriage, and the birth of a child, must both happen to revoke the will of a man, yet it has been settled that a woman's marriage alone will be a revocation or rather countermand of her will, if she dies in her husband's lifetime. This was so determined in the case of *Forse v. Hembling*, in Coke's Reports.<sup>(a)</sup> It was objected that, although after the marriage the wife could not revoke her will, yet that that was reason why the marriage should be a countermand: for that if a man of sound memory made his will, and afterwards became *non compos mentis*, he could not countermand his will, and yet such his disability was no countermand.

The marriage of a woman after making her will is alone enough to revoke it, without the birth of a child.

But the Court were unanimous that the marriage and coverture at the time of the death was a countermand, and that for several reasons. 1st The making of a will is but the inception of it;— it does not take effect until the death of the devisor: and it would be against the nature of a will to be so absolute that he who makes it, being of good and perfect memory, cannot countermand it; therefore the taking of a husband shall amount to a countermand at law.

When a man of sound memory makes his will, and afterwards, by the visitation of God, becomes of unsound memory (as every man for the most part before his death is), it would be hard, if this act of God should be a revocation. Secondly, they observed that it would be injurious to women if their wills, after their marriage, were to stand irrevocable: and this they must

(a) 4 Rep. 61 a. Shep. Touch. ed. p. 410. Swinb. 145. Doe v. Staple, 2 T. R. 695.



be, unless the marriage were a revocation; for the law will neither allow a will to be made or revoked by a *feme covert*, because both might then be done by the constraint and coercion of the husband.

Whether, if she becomes discoverd again, and dies a widow, the will is revived.

It was said by Manwood, in Plowden's Commentaries, (c) that if a *feme sole* makes her will the first day of May, and gives lands thereby, and afterwards on the 10th day of May she takes husband, who dies on the 20th day of May, and the woman dies on the 30th, the devise is good; for it could not take effect until her death, at which time she was discoverd, as she was at the time of making her will; and the intermarriage should not countermand that which was of no effect in the lifetime of the husband. Which proposition was not denied. And it is observable that in the above-mentioned case of *Forse v. Hembling*, where this position of Serjeant Manwood is cited, no disapprobation of it was intimated by the Court; and the judgment in that case is expressly grounded not only on the marriage of the testatrix, but also on the circumstance of her dying covert baron. Though in *Cotter v. Laver*, (d) it was said by Lord Chancellor King, without any qualification, that a woman's marriage alone was a revocation of her will, yet that opinion being grounded entirely on *Forse v. Hembling*, does not carry the doctrine further.

It seems to have been held, however, in *Mrs. Lewis's* case, (e) that a will made by a woman before marriage is so totally revoked by her marriage that it cannot revive on the subsequent death of her husband. And it is to be observed, that though in *Doe v. Staple* (f) none of the Judges pronounced a decided opinion on the point whether a will by a *feme sole*, revoked by her subsequent marriage, would have its validity restored to it by the wife's surviving her husband, yet the language used by Lord Kenyon is rather on the negative side; for his

(c) Plowd. 343.

(d) 2 P. Wms. 524. See also 2 Bl. Comm. 499.

(e) 4 Burn. Eccl. Law, C. 47.

(f) 2 T. R. 684.



Lordship's words are, that "the will of a woman made before coverture ceases to be her will afterwards; because it is of the *essence* of a will that it should be valid *during the remainder of the testator's life*. Therefore, generally speaking, the will of a woman ceases to have any operation after she becomes covert." That learned Judge does not say "during coverture," nor does he add, "if she dies during coverture;" but his words express the proposition in as unqualified a sense as those of Lord Chancellor King. And in the reason which he gives for the revocation is comprehended a negation of any such revival of the will by the death of the husband; for if it be of the essence of the instrument that it should be always valid (and it is not valid during the coverture, as has been before shewn, because not revocable), then it should seem to follow as a clear consequence, that what destroys the essence must be a total destruction of the thing itself, so as to leave it no potential existence.

The counsel in Mrs. Lewis's case, which was before the delegates, cited many authorities from the civil law to shew, that among the Romans, if a man made his will, and was afterwards taken captive, such will revived and became again in force by the testator's repossessing his liberty. But this was answered by adverting to the difference between a voluntary act, and an act of compulsion. And the will was adjudged not to be good. So that the weight of authority, and perhaps of principle, seems to be against holding the will of the *feme sole*, revoked by her subsequent marriage, to be restored to its operation by the wife's surviving her husband.

It has been considered doubtful whether a power given to a *feme sole* was not suspended by her marriage: (g) but the law is now understood as settled, that a *feme covert* may execute a power given to her while *sole*. However, where an agreement before

A married woman may execute a power given to her while sole to be exercised during marriage. And if it is exercised

(g) 3 Bro. P. C. 308. *Rich v. Beaumont*.

before marriage, it will be revoked by the marriage.

marriage was entered into, that a settlement should be made of the wife's estate, reserving to her a power of disposing of it by will; and before the marriage she devised it in favour of the intended husband, who survived her, the will was nevertheless held to be revoked: for the agreement was for an authority to be exercised during the marriage, and therefore could have no operation in preventing the consequence of law with respect to what was done before the marriage. (*h*)

(*h*) See *Doe v. Staple*, 2 T. R. 684; and see the same point ruled in Equity, in *Hodgson v. Lloyd*, 2 Bro. C. R. 534.

## CHAP. IV.

## REVOCATION OF WILLS OF PERSONAL ESTATE

## SECT. I.

*Chattels Real.*

THE subject of revocation includes some questions of great nicety in respect to devises of leases. Whether a fresh lease taken by renewal passes under a prior disposition by will of the original lease was a point in the case of *Marwood v. Turner*, (a) before Lord Chancellor King. The argument against the revocation supported itself on the following reasons:—That the testator had expressed in his will his ardent desire that his trustees, to whom the lease was devised, should use their utmost endeavours to continue the lease in the male line, as long as there were any to inherit the title. That as to the surrender of the old lease, that being only to take a better and more beneficial estate, was intended for the advantage of the devisee, to give him a larger and more extensive interest, and to increase the bounty that was before designed him. Now to make such an intended act of kindness a destruction of the will, would be to invert the meaning of the testator. That the renewal of the lease was only ingrafting upon the old stock that which was of the same nature with the old stock, and was a continuation of the same estate with some little addition to it. That

Whether a renewed lease passes under a prior disposition by will of the original lease.

(a) 3 P. Wms. 168.

this was demonstrated by the common case, where a trustee of a lease for lives, when all the lives but one are expired, renews for the old life and two new ones, and then the old life dies; here though, but for the renewal, the lease would have been quite at an end, yet the renewed lease is held subject to the same trusts as the old lease was, and is considered as a continuation of the same estate. That it was very usual to make provision for younger children out of these leases, which commonly require a renewal every seven years, or upon the dropping of a life. And if one, so seised or possessed, having made his will, and thereby provided for a younger child or children, should soon afterwards renew his lease, but forget to republish his will (which might often happen), such a construction would create the greatest inconveniences. That no judgment at law, nor decree in equity, had been cited, whereby it had been determined that the bare renewal of a lease was a revocation of a will. And it was further urged, that if this renewal of a lease was a revocation in *law*, yet it would not be so in equity; but the renewed lease would be subject to a trust for the devisee.

But it was held and decreed by the Lord Chancellor, that the renewal of the lease for lives in that case was a revocation of the will as to this subject; for that by the surrender of the old lease the testator had put all out of him, and had divested himself of the whole interest, so that there being nothing left for the devise to work upon, the will must fall; and the new purchase being of a *freehold descendible* could not pass by a will made before that purchase. And his Lordship expressed surprise that this case, which must have often happened, had not been before determined.

We should observe that the true reason upon which this point of revocation turns, is, that the specific thing which was the subject of devise is gone, so that the words of the devise can have no operation. And this reason applies as much to a chattel lease renewed after a will containing a bequest of it, as to a freehold lease;

for every specific bequest must upon the same principle be considered as repealed by the subsequent disposition, alienation, or destruction of the particular subject in the testator's lifetime.

There is, however, a material difference as to this point between freehold and chattel property. If a lease held upon lives be devised, and afterwards renewed by the testator, the devise is revoked, although the will should contain words of future import applicable to that interest; for the renewal being a new purchase (1) of a freehold, it cannot pass by an antecedent will, as has been fully explained in a former part of this Work. Whereas if a testator possessed of a *chattel* renewable lease devises all his *estate, right, and interest*, which he shall have to come in the particular lands so in lease to him at the time of his death, or includes it in a general devise of his residuary property, a lease taken by him after making his will, by way of renewal, will pass by it. (b)

A material difference in this respect between freehold and chattel leases.

In the case of *Carte v. Carte*, (c) Lord Hardwicke appears to rest much upon a distinction between *trusts* and *legal estates* in respect to the operation of a will upon these renewed chattel leases; and he alludes to *Abney v. Miller*, as being the case of a legal estate, whereas in *Carte v. Carte* the testator was only *cestui que trust*. But in *Abney v. Miller* his Lordship had said that the rule of revocations must be the same in law and in equity; and the same observation has been made by almost every succeeding Chancellor.

The rule respecting revocations, the same both at law and in equity.

(b) *Abney v. Miller*, 2 Atk. 593. *Hone v. Medcraft*, 1 Bro. C. C. 261. *Stirling v. Liddiard*, 3 Atk. 199. *Slater v. Norton*, 16 Ves. J. 114. *Ibid.* 197; and see *Wind v. Jekyll*, 1 P. Wms. 574.

(c) 3 Atk. 174.

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(1) A woman purchased a church-lease to her and her heirs for three lives, and died, leaving an infant daughter; two of the lives dropped; the infant's guardian renewed the lease, and then the infant died without issue; the freehold lease was held to be a new acquisition, and of consequence as descendible to the heirs *ex parte paterna* *Mason v. Day*, Prec. in Ch. 319.

It might be doubted, indeed, whether the decision of *Carte v. Carte*, upon the Chancellor's own reasoning on the case, required any other distinction to support it than that which arose out of the import of the words used in the will. The testator bequeathed to his eldest son Thomas, after giving some legacies to other persons, all the rest of his goods, chattels, and estate whatsoever, whether real or personal, in possession or reversion; and then by a supplemental clause directed that he should have the disposal of his lease, and receive to himself all the profits and advantages accruing from it; which words might seem sufficient to pass the beneficial interest then subsisting, together with the benefit of all subsequent renewals, and to have comprehended and passed the subsisting lease, and future renewals, had the interest been legal instead of equitable. For his Lordship, in the lastmentioned case, observed—"there is no question but that a man by will may bequeath a term of years which he has not in him at that time, but which comes to him afterwards. Therefore all these cases of revocations of legacies, or bequests of terms of years, arise from the short penning of the will; and if in the case of *Abney v. Miller* the testator had said, I will give all the interest I have in the lease, there is no doubt but that the renewed lease would have passed." (2)

(c) 3 Atk. 174.

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(2) In *Abney v. Miller*, however, his Lordship, for conveying these after-taken leases, suggests words of a future import as necessary in addition to the words *all my estate, &c.*: the words he prescribes are, *all my estate, right, and interest, which I shall have to come in this lease*. And in *Rudstone v. Anderson*, 2 Ves. 418. the Master of the Rolls, Sir J. Strange, would not allow there was any real distinction between the import of the words *all my tithes* and *all my estate in the tithes*. If a new interest were acquired after the will, it would not pass by words devising all the testator's subsisting interest. See same point in *Slatter v. Norton*, 16 Ves. J. 197. by Sir W. Grant, M. R.

It appears from a careful comparison of the cases, that for the renewal of these chattel leases to be a revocation, the devise of them must be specific, and that whether the disposition is revoked or not is a question to be determined by that short criterion. The case of *Stirling v. Lydiard* (*f*) does in effect settle it upon this basis. There the testator gave all and singular his leasehold estate, goods, chattels, and personal estate whatsoever, to his daughter; and if she died without issue living, then to the defendant. The testator afterwards renewed a lease with the Dean and Chapter of Windsor; which was held to be no revocation, and the lease passed by the will; the Lord Chancellor observing that "it was a mistake to suppose this a *specific* legacy: it was a general devise of the whole. Suppose the testator had purchased a new lease,—would not that have passed? Why then should not a new term in a lease equally pass?"—"If I were to construe this a revocation," said his Lordship, "I do not know that if a man were to give all his Bank, East India, and South Sea stock, and should afterwards turn it into money, it might not as well be insisted that this was a revocation."

Whether the renewal of a chattel lease is a revocation depends upon whether the devise is specific or general.

So that whether the subsequent lease taken by renewal would pass or not by the antecedent disposition will depend entirely upon the question whether the words of the bequest confined the apparent intention to the thing then actually subsisting, or extended to future interests growing out of it: in a word, whether the legacy was specific or general. (3)

But it would seem, according to *Abney v. Miller*, that if the renewed lease were not perfected by execution in the testator's lifetime, not only would an agreement for such new lease be ineffectual to operate a

(*f*) 3 Atk. 199.

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(3) See the case of *Hone v. Medcraft*, 1 Bro. C. C. 261. where the same ground of distinction is adopted. See also *Copin v. Fernyhough*, 2 Bro. C. C. 291.

revocation; but the actual surrender would not affect the previous disposition of the lease: it was accordingly held by Lord Hardwicke, that as the college seal had not been affixed to one of the renewed leases in *Abney v. Miller*, though the old lease had been surrendered, and the new one prepared and accepted, yet the bequest of such lease was not revoked: which part of the case is not very clear, if it can be said to be intelligible at all, without supposing that, the surrender being made by the same instrument as the new lease, and if not stated as the consideration of the new lease, at least implicitly (4) contained in the acceptance of such new lease, such surrender would not be complete, according to the intention of the parties, until the change and substitution was completed by the execution of the instrument by the lessors. And indeed, supposing the surrender to be made by a separate instrument, yet the making of the new lease, and the yielding up of the old, being reciprocal acts, perhaps the surrender could scarcely be considered as complete, in equity at least, until the fresh lease had been granted.

What propositions appear to be well settled on this subject.

On a subject into which so much refinement has been introduced, it is difficult to find any steady propositions; but all the cases appear to agree in this—that the surrender of the old and the taking of a new lease will be an ademption or not of the previous disposition by will, according as the disposing words are held to import, only the actual thing, or all the testator's eventual interest in it. Still, however, what particular terms denote the one or the other intention is, in some degree,

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(4) In these cases the effect produced is not so correctly expressed by revocation as by ademption. It is not by countermanding the disposition, but by withdrawing or destroying the subject-matter of the disposition, that the consequence is properly understood to be produced. Whatever destroys the subject of a specific devise, must of necessity annul its operation: thus if, after devising an estate held upon lives, the testator purchases the reversion, the devise is revoked and the estate descends. See 2 Atk. 425.



open to controversy. It appears, according to the report of *Carte v. Carte*, that Lord Hardwicke was of opinion that if in *Abney v. Miller* the testator had said, "I give all the interest I have in the lease," the will would have passed the renewed lease,—that is, such words would have made the bequest general and prospective. But Sir John Strange, as appears from the above-cited case of *Rudstone v. Anderson*, thought that the bequest was not the less specific by reason of the words *estate and interest*; and we have seen that Lord Hardwicke, in *Abney v. Miller*, suggests other words of future import to be added to the words *estate and interest*, when he points out a mode of including future renewals.

It is out of dispute, however, that a testator may by his will pass his future chattel interests, whatever they may be, provided they come within the description of the bequest; and that wherever the words are general, property of this nature, though subsequently acquired, is comprehended within the scope of them: (e) thus if a testator gives all his personal estate whatsoever, and afterwards surrenders a subsisting lease, and takes a new one, or makes an entire new purchase of a leasehold estate, both these descriptions of property will pass.

In a case lately determined in the Court of Chancery, (f) another proposition of considerable breadth and certainty on this subject is furnished, viz. that whether the disposing words are to be confined to the specific interest, or are to be interpreted as descriptively embracing after acquired property, will depend not only on the import of the particular words, but upon the general context of the will.

In *James v. Dean*, the case alluded to, the Chancellor took it to be established in *Hone v. Medcraft*, and *Copin v. Fernyhough*, that where there is a general

(e) See the case of *Stirling v. Lydiard*, 3 Atk. 199.

(f) *James v. Dean*, 11 Ves. J. 383.

bequest in the terms of "all my leasehold estates," and the testator afterwards surrenders and takes a new lease, the bequest is revoked. We cannot but observe, however, that in the cases said to have established this proposition, the devise was not in a general form, but appeared to import the disposition of a leasehold estate particularly described and enumerated among other distinct parts of the testator's property. And, indeed, before the general words "all my leasehold estates" can be held to be a specific disposition of subsisting interests, the opinion and decree of Lord Hardwicke, in *Stirling v. Lydiard*, above cited, seems necessary to be explained out of the way.

But the great point of *James v. Dean* makes the question whether the subsisting interest only or future interests in chattels pass by the will to depend entirely upon the indications of the testator's intention; and decides that the intention in this respect is to be collected from the whole context, and a comparison of all the parts of the will. The case was shortly as follows:—Thomas James, by his will dated the 25th of April, 1788, gave and bequeathed to his wife, Judith James, a messuage and some land at Standgate, held by him under a lease from the Archbishop of Canterbury; and after her decease he gave the same to Sarah James, Jane James, and Elizabeth James, his brother's daughters, their executors, administrators, and assigns, for all such term, estate, or interest, as should be then to come therein, as tenants in common. The testator then directed that the rent, fine and fees, for the renewal of the lease of the said premises at Standgate, should be paid by his wife, during her life, and by his brother's three daughters afterwards, as such rents, fines and fees became payable. Then, after giving some other parts of his property, he made the following disposition: "I also give and bequeath to my wife Judith James, during her life, all my messuages, lands, and tenements, in Vine-street, in the parish of Lambeth, which I hold by lease under Sir William East (being the premises in

question), for all the residue of my term and interest therein ; and after her decease I give and bequeath the same to my godson, Thomas James, his executors and administrators, for all the residue of the term and interest I shall have to come therein at my decease." And then the testator gave to his said wife all his leasehold estate at Floatmead, and all other the estate which he purchased of Anthony Keck, Esq., and which he then held by lease from Sir William East, she paying for renewing the said lease at the usual times, during her life, and keeping the said premises in good repair; and after her decease he gave the same among the said three daughters of his brother James, as tenants in common. He then made his wife his residuary legatee, and appointed her one of his executors.

The testator was, at the date of his will, in possession, under a lease granted by Sir William East, of the premises, in Vine-street, Lambeth, dated the 12th of August, 1769, to hold for twenty-one years from the Lady-day preceding, if the lessor and two other persons should so long live, with a covenant by the lessee that in case of the death of any of the said lives (being the lives upon which the lessee held those premises, with others from the Archbishop of Canterbury,) before the expiration of the term, and the lessor should renew from the Archbishop, he, the lessee, his executors, &c. would pay a proportionate share with the other tenants of the fines to the Archbishop upon every such renewal ; and Sir William East covenanted, upon such renewal of the original lease by the Archbishop, to grant a new lease of the premises thereby demised for the remainder of the term of twenty-one years, which should be then to come and unexpired. But the lease contained no direct covenant for farther renewal.

The testator died in December, 1790 ; the lease, which expired on the 25th of March preceding, not having been renewed by him. But he had remained in the occupation of the premises until his death, and half a year's rent under this occupation had been paid by

him after the expiration of the lease, during his life. Sometime after the testator's death, *viz.* on the 29th of March, 1791, Sir William East granted to Judith James a new lease of the premises in question, to hold from the 25th of March for forty-two years, if three persons named, or any of them, should so long live. The bill was filed by Thomas James, named in the will, against the executors of Judith James, the testator's widow, praying that the renewal of the said lease by Judith James might be declared to be upon the trusts of the will. The answer insisted that she took the new lease for her own benefit: and this was the question.

The Master of the Rolls dismissed the bill, upon the ground that though a testator might so express his intention as to pass any interest existing at his death, yet in this case his intention seemed merely to give the residue of the term he then had from Sir William East, and that nothing more was in his contemplation. Upon the appeal from this decision the Lord Chancellor considered that the equitable question before him must depend upon the legal question, whether if the lease had been renewed to the testator, it would have passed. It is evident that if the new lease had been made to the testator himself in his lifetime, this would have been a case for a trial at law, as being a mere legal question, depending upon the import of the words of the will, in respect to such after-acquired property. And it seems to be a rule of equity, to be collected from the case we are now considering, that where the disposing words are such that a court of law would have held the subsequent acquisition by renewal in the testator's lifetime to have passed by them, any renewals after the death of the testator, by his representatives, shall be for the benefit of the persons to whom the beneficial interest in the subsisting lease was devised.

It is a rule that where the disposing words would have passed the leases, if renewed in testator's life, any renewals after his death by his representatives will pass by such words.

A tenancy from year to year is devisable and transmissible.

Now, in this case, though the testator lived out the lease which he had given by his will to his wife for her life, and at her decease to Thomas James, yet as he continued to occupy till his death, and paid rent, he

became a tenant from year to year, which was an interest devisable and transmissible. (g) This legal interest, though become a tenancy only from year to year, attracted to itself that sort of tenant-right, or good will, on which the claim to a renewal would have grounded itself; for it was a sort of excrescence out of the old subsisting lease which had expired. The Court therefore considered, that if this interest would pass by the will, such benefit of renewal would pass also as an adjunct to it, subject to the operation of the same testamentary disposition.

And the good will or tenant-right which accompanies it passes with it.

It was therefore said by his Lordship, that the question whether the interest of the renewed lease (supposing such lease to have been renewed in the testator's lifetime) would or would not have passed, must be decided, to raise any question between these parties upon the record. For the lease not having been renewed, and the testator being at his death possessed of no larger interest than from year to year, the doctrine cannot be applied, unless it would have been applied if he had been lessee in the renewed lease. His Lordship then laid it down as a sound rule of construction, that when words are, by their import, *prima facie* equivalent to pass future interests in personal estate, that construction ought to prevail, unless the context, in sound interpretation, calls for another construction; and this depends upon the context of the whole will.

When words are *prima facie* sufficient to pass future interest in personalty, that construction ought to prevail, unless controlled by the context.

His Lordship thought that though there was a difference between the leases, the lease in question not containing the same direct covenant for renewal which occurred in the others; yet there was enough in the lease in question pointing that way, to lead the testator to think that the expiration of the term would not put an end to the interest. Some parts of the will, particularly the last bequest, were evidently intended to pass the renewed lease; and the different clauses were much the same in effect, though expressed in different words. The obligation upon the wife to renew from

(g) See *Doe v. Porter*, 3 T. R. 13.

time to time shewed that he meant not only the interest *he* had in the present lease, but the interest *she* would acquire under the covenant. Between the bequests accompanied with this express direction to renew, was the bequest of the premises in question ; and the person who was tenant for life of those premises was the wife and general residuary legatee. His general intention therefore was, that as to the particular part, so specially given to her, she should take only a life interest, and as general residuary legatee she should take absolutely for her own benefit.

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## SECT. II.

### *Chattels Personal.*

A REMARKABLE case which happened in Lord Nottingham's time is said to have given rise to the clause in the statute for invalidating unwritten revocations of wills of personal estate.

Case said to have given rise to the clause in the statute 29 C. c. 2. 3. for invalidating unwritten revocations of wills of personal estate.

Mr. Cole at an advanced age married a young woman who did not conduct herself with propriety. After his death she set up a nuncupative will, said to have been made *in extremis* by which the whole estate was given to her in opposition to a written will made three years before the testator's death, giving 3000*l.* to charitable uses. The nuncupation was proved by nine witnesses. Upon the appeal to the delegates from the sentence of the Prerogative Court in favour of the written will, Mrs. Cole offered to go to a trial at law in a feigned action, submitting to be bound by the result. Upon the trial at the bar of the Court of King's Bench, it appeared that most of the witnesses for the nuncupation were perjured, and that Mrs. Cole was guilty of subornation. She then applied for a commission of review, which was refused ; and upon that occasion Lord Nottingham said, " I hope

to see, one day, a law that no written will shall be revoked but by writing." (a)

The statute of 29 Car. 2. c. 3. s. 22 (b) is express, that no will in writing concerning any goods or chattels, or personal estate, shall be repealed; nor shall any clause, devise, or bequest therein, be altered or changed by any words, or will by word of mouth only, except the same be in the life of the testator committed to writing, and after the writing thereof read to the testator, and allowed by him, and proved to be so done by three witnesses at least. (1)

These points were in question in the following case, in the Prerogative Court:—Mr. Wright died on the 13th February 1814, having on the 5th of August 1800 made his will appointing Lady W. and C. A. executors, and bequeathing to the former the residue of his property, after payment of his debts and some specific legacies. The allegation offered pleaded that the deceased on the 11th of February, two days only before his death, being very ill, addressed himself to two or three persons who were with him, and declared his intention to give a certain sum out of the money which he had invested in the bank to J. S. The words used by him on this occasion were reduced into writing on the 15th of March, after his death, and attested by the persons in whose presence they were uttered. The admission of this allegation to proof was opposed on the ground that the statute 29th Car. 2. by the clause above cited, required that no will in writing concerning any personal estate should be repealed, nor any clause, devise, or bequest, therein be altered or changed, by any words, or will by word of mouth only, except the same be in the life of the testator committed to writing, and after the writing thereof read to the testator, and allowed by him, and proved by three witnesses as aforesaid.

(a) See *Matthews v. Warner*, 4 Ves. J. 196, note (a).

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(1) But it is not made necessary that such revocation by parol, when committed to writing, should be signed or attested.



From the facts stated in the allegation it appeared that the money in the bank was included in the residuary clause ; and the judge observed that it was clear that as the money in the bank was included in the will, the effect of the nuncupative codicil would be to alter the will in that respect. That the act, on account of its general objects, ought to be strictly construed and enforced. That it was imperative upon the Court, and left it no discretion. That as to the case of *Brown v. Manby*, in 1770, which had been cited, the words were there pleaded to have been written in the lifetime of the deceased, and with his privity ; and therefore it was possible the requisites of the Act might appear on proof to have been complied with, but that in the present case it was clear from the facts pleaded that they were not. The Court accordingly pronounced for the will.

But where a man by will in writing devised the residue of his personal estate to his wife, and upon her dying in his life-time made another disposition of the residue by a *nuncupative* codicil, in respect to which the requisites of the Act regarding nuncupative wills were complied with, this was resolved to be good ; for by the death of the wife the devise of the residue was totally void, and the codicil was no alteration of the former will, but a new will for the residue. (c)

There must be clear evidence of present intention to effectuate the revocation.

As there must be a manifestation of a clear and serious intention to make an actual disposition for any writing to operate as a testamentary act, so to revoke or alter a prior complete testamentary disposition, at least an equal indication of the disposing mind will be required. And this appears from a case recently decided in the Prerogative Court, (d) which, as it marks with some precision the degree of evidence which that court requires to establish the operative intention, shall

(c) 1 Abr. Eq. Ca. 408. and see 4 Burn. Eccl. L. 203.

(d) *Sitwell and Others, by their Guardian v. Parker*, Prerogative Court, Doctors' Commons, March 11.



be stated fully. The question was, whether certain alterations made in a paper purporting to be instructions for the will of Sir S. S. after the will prepared from it had been executed, were operative as codicils, or were merely deliberative as to an intended alteration, to be afterwards carried into effect.

It appeared that Sir S. S. had duly made his will on the 2d of March 1810, which was of considerable length, occupying upwards of fifteen sheets of paper, and had therein made an ample and detailed disposal of his estates and other property. The instructions from which this will was prepared were contained in a paper intituled "Heads or Instructions for the will of Sir S. S.;" and this paper had been previously left with him for his perusal and approbation; after which it had been returned to his solicitor to prepare the will from, but signed in pencil by the testator, that it might operate in case of accidents in the mean time. It contained, amongst other bequests, one of 2000*l.* to each of the younger children of F. S., Esq., Sir S.'s brother, the eldest being otherwise provided for: but this legacy had been struck through in the instructions, and was therefore omitted in the more formal will, in consequence of Sir S.'s expectations, as explained by him to the solicitor, that the family of Lord C., into which Mr. F. S. had married, would provide for his younger children. After the execution of the will, Sir S. delivered it into the possession of his solicitor, choosing to retain the instructions himself, as containing a more abstracted account of the contents of the will, and therefore more easy of reference than the will itself in its more precise and formal language. Sir S. died on the 11th of July, 1811, and a probate was obtained of his will only: but the paper of instructions being afterwards discovered in his secretary, was found to contain an obliteration of a legacy to Mr. G., the deceased's steward, with a mark in the margin to refer to it, and this indorsement on the outside, "If  
" any legacy includes Mr. G. in this or any other will

“ or codicil, I revoke it.—S. S.—February, 1811.” The pencilled obliteration of the legacy of 2000*l.* to each of Mr. F.’s children was also crossed through in ink, as if with an intention of reviving it; and the deceased had on the 29th day of March, 1811, preceding his death, signed his name to each of the sheets except the second, which contained the obliteration of Mr. G.’s legacy. These alterations appeared to have been made since the execution of the will; and Mr. F. S.’s children, acting by their father as their guardian, instituted the present proceeding as the parties interested, calling in the probate of the formal will, and requiring the executors to take a new probate of it jointly with the paper of instructions, as containing together the will of the deceased.

The evidence in the case fully established the circumstances stated, and also that the deceased, after the execution of the will, had reason to believe that the C. family, with whom the children then were, would not provide for them as he had expected. This idea was subsequently confirmed by an intimation which was received from a distinguished member of the family; and the deceased in consequence often expressed to those in his confidence, that he supposed he must himself provide for the children, or they would come to distress; and for this reason he discontinued the advances of money which he occasionally made to his brother, and apprised him of his intention of providing for his children instead. He was also proved to have declared that he should see his attorney at —— races, and should there make an alteration in his will: but he died before that happened.

Under these circumstances it was contended, on the part of the children, that the deceased, by striking out the former obliteration of their legacy, and signing every sheet of the paper except the one containing the obliterated legacy to his steward, clearly meant to revive the bequest pursuant to his declared intention of providing for them; and that he was only prevented from

giving more complete effect to that intention by his death, before he again saw his attorney, as was expected.

Sir John Nicholl, after stating the facts of the case, observed, that the presumptions were strong against the paper, as it had been superseded by the execution of a more formal instrument ; and the alterations themselves, relied upon in argument as tending to revive it, were very equivocal. It was possible that they might have been intended as operative : but it was equally so that they might be deliberative only. Neither point could to a certainty be ascertained from the present evidence, but it was merely matter of conjecture ; and the Court could not, upon conjecture alone, pronounce for the alterations in the paper as being intended by the deceased to have operation. He then entered into an examination of the circumstances tending to shew *quo animo* the alterations were made ; and inclined to think that they were merely deliberative as to an intended future alteration in his will. The revocation of the steward's legacy, he observed in particular, was expressed not only by striking it through, but also by an indorsement of words, declaratory of his intention in so doing ; and it was therefore to be supposed, if he really entertained the same final intention with respect to the revival of the children's legacy, that he would have signified it in a similar manner. What the deceased's intentions really were it was impossible to ascertain ; he might have formed them, and even proposed to himself the time and manner of giving them effect, and the Court could only lament that he had not made them more apparent ; for, with all the commiseration naturally inspired by the situation of the children, it could not, consistently with its ordinary rules of decision, pronounce for the alterations in this paper, when the intention with which they were made was not proved to the extent required by those rules. He therefore felt himself bound, though very reluc-

tantly, to pronounce against the paper in question : but directed the costs to be paid out of the estate.

Shortly after the above case, another on the same question was determined in the same Court, and by the same judge, which may be useful in helping the judgment on questions respecting the effect of alterations of solemn wills. The case was that of *Dickenson v. Dickenson and Others*, (*d*) in which the question was, whether certain alterations in the will of W. D. deceased were made by the testator, or by his directions, with an intention that they should have legal operation, or were merely deliberative as to some future testamentary disposition intended to be made by him.

Alterations in pencil effectual, there being sufficient proof of a dispositive intention.

The will was duly executed by the testator in the presence of three witnesses, whose signatures were added. The testator gave an annuity of 60*l.* to the testator's wife for life, and his freehold property to his two sons, with some pecuniary legacies. The alterations were made in *pencil*, and consisted in striking out the wife's annuity of 60*l.* and substituting in the place of it 160*l.* A line was also drawn through the devise of the freehold property to the sons, and some other of the legacies were altered. The will, thus altered, was enclosed in an envelope, on which was also written in pencil, "to my wife 160*l.* per annum as long as she continues my widow." The sons were dead at the time of the alteration. The judge observed that the alterations were not invalid on account of their being written in pencil. They appeared to have been very deliberately made ; the figures inserted were also carried out into the margin, and the pencil writing on the envelope seemed to confirm the alterations made in the enclosed. The papers were deposited in an iron chest by the testator, and not kept for revision and completion. The death was not sudden : the testator had ample time to make another will, if he had so intended. Under these

(*d*) 2 Phil. Rep. 173 ; and see *Mence v. Mence*, 18 Ves. J. 348.

circumstances, the Court felt itself called upon to pronounce for the operative effect of the alterations.

Implied revocations of wills, and testaments of personal estate, fall in general under the same doctrine, and are subject to the same principles and rules as those which have governed the decisions in respect to property in land. But there are also some distinct considerations which apply to legacies in particular.

We have already seen that where a parent makes provision for a child by his will, and afterwards gives to such child a portion in marriage, if a daughter, or pays a sum for establishing him in the world, if a son, the legacy is held in general to be adeemed. (*e*) But not so if the provision made in the parent's life-time be not of the same kind with the legacy, (*f*) or be made subject to a contingency, (*g*) or if it be made expressly in satisfaction of another claim, (*h*) or if the two gifts be upon different terms. (*i*)

Of ademption of legacies by subsequent advancements.

Where the subject of a specific legacy is withdrawn, the legacy must fail: but there are many nice, and some, as it should seem, over-curious distinctions, as to what, to this effect, shall be considered as *specific*.

Wherever the subject of a specific legacy is withdrawn, the legacy must fail.

Where a sum of money has been bequeathed out of a particular fund, it has, for the most part, been considered as a general legacy, or *legatum in numeratis*, so as to entitle the legatee, if the testator receive it in his lifetime, to have it made good out of the general effects. (*k*) But other cases have been decided a different way. (*l*)

The distinctions as to what is specific and what is general have run into great subtilty.

The Courts on this subject have run into such nicety as to adopt distinctions between a bequest of a sum of money due on a bond from A., and a bequest of such

(*e*) 1 P. Wms. 681. Hartop v. Whitmore.

(*f*) 1 Bro. C. C. 425. Grave v. Earl of Salisbury.

(*g*) 2 Atk. 491.

(*h*) 3 Bro. C. C. 192.

(*i*) *Id. Ibid.*

(*k*) 1 P. Wms. 771. Savile v. Blacket, 4 Bac. Abr. 355.

(*l*) 2 Fonbl. 367. note. (+)

debt generally, holding the legacy in the former case to be pecuniary, and in the latter to be specific. (*m*) And in this respect a difference has sometimes been taken between a voluntary and compulsory payment of a debt after a bequest of the same; the voluntary payment being considered as not indicating any change of mind in the testator, and therefore not an ademption, while the payment procured by compulsion has been looked upon as the result of an active step taken by the testator in derogation of his own gift. (*n*) But this distinction has been denied in other cases. (2)

The great question in these cases is, whether the thing bequeathed is an undivided thing, implying identity, or corpus, or a thing conveying rather the idea of value or amount, and capable of being substantially answered in quantity or specie.

If a testator bequeaths a certain quantity of stock, then standing in his name, it would be difficult to regard his subsequent selling out of that stock in any other light than as an ademption of the legacy. But if the bequest be of the testator's stock of a certain amount, though he should afterwards sell it out; still if he buys as much again into the same stock, and dies possessed thereof, his will doubtless would operate upon such stock. If the testator sells out the stock so bequeathed, and afterwards lays out the proceeds in another fund, the legacy fails; and though the will should be afterwards repub-

(*m*) 2 P. Wms. 330. *Rider v. Wager*, and n. 1. and see *Ashburner v. M'Guire*, 2 Bro. C. C. 118. 1 Eq. Ca. Ab. 302.

(*n*) 2 P. Wms. 330. n. 1.

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(2) 4 Bac. Abr. 355. n. b. and see the note in Serjt. Williams's edition of the cases in the time of Lord Talbot, p. 228 to the case of *Partridge v. Partridge*. In *Coleman v. Coleman*, 2 Ves. J. 640. this distinction was considered a strong circumstance from which to gather the intention, though not as an absolute or decisive ground. See *Hanley v. Potter*, 2 Cox, C. C. 180. *Fryer v. Morris*, 9 Ves. J. 360. *Barker v. Rayner*, 5 Madd. C. R. 208.

lished by a codicil; the stock subsequently purchased will not pass by the will. (o)

Wherever a bequest points rather to the amount, so that the value or quantity, rather than the thing itself, appears to be the substance of the gift, the gift may in effect be the same, though circumstantially varied. Thus a testatrix, by her will, stating that it was the wish of her mother and herself, that the 500*l.*, which they then had out upon mortgage, should be given to J. S. and her family, bequeathed the said 500*l.* with interest accordingly. When the will was made, the testatrix and her mother were both interested in a sum then on mortgage: but upon the death of the mother the testatrix took out administration to her; and, having called in the sum of 500*l.*, applied it to different purposes, and then died without having altered her will. Sir W. Grant held that the legacy was not adeemed. He said that the essential characteristic of the legacy was its consisting of a sum, in which the testatrix admitted that her mother and herself had some sort of joint-interest, and which they were both desirous of giving to J. S. and her family. The characteristic was not at all dependent upon the particular security on which the money might be placed. The testatrix considered the circumstance of its being at that time out on mortgage as merely accidental. She speaks of the sum "we have now out on mortgage," descriptively of the present situation of the money. The next day it might not be out on mortgage: but it would be still the 500*l.* in which the mother and the daughter had a joint-interest, and which at the time of the will they had out on mortgage. The thing given is not the mortgage, but the money. Whether it remained upon mortgage

Where the value, quantity, or amount of the thing, rather than the thing itself, appears to be intended, the change or extinction of the thing is not an ademption.

(o) *Drinkwater v. Falconer*, 2 Ves. 625. per Lord Hardwicke, and see the general doctrine in *Perkins v. Micklethwaite*, 1 P. Wms. 275. *Purse v. Snaplin*, 1 Atk. 414. *Carleton v. Griffiths*, Burr. 554. *Barton v. Cook*, 5 Ves. J. 464. *Humphrey v. Humphrey*, 2 Cox 184. *Sibley v. Perry*, 7 Ves. J. 629. *Lunn v. Bank of England*, 15 Ves. J. 569.



at the time of the testatrix's death appeared to him to be matter of indifference. That circumstance was no ingredient in the gift, either by way of condition, or of inherent description. (*p*)

And where stock *specifically* bequeathed as stock standing in the testator's name was afterwards transferred by the testator into the joint names of himself and the legatee, such was not considered as any substantial alteration of the thing to work an ademption of the legacy. (*q*) Upon the same principle, if a testator changes his interest in the subject of a legacy bequeathed by him from equitable to legal, such unsubstantial alteration does not operate to redeem the legacy, as if he takes a transfer to himself of a sum in the funds from his trustees. (*r*) And where stock in consideration of marriage was vested in trustees for the separate use of the wife for life, with power for her to dispose of it by will, and she made a will during coverture, and survived her husband, and afterwards took a transfer of the stock into her own name, the bequest was held not to be adeemed. (*s*)

Change of the fund by act of parliament not an ademption.

Where an alteration of the fund is made by Act of Parliament, a bequest of a sum in such fund before such change is not affected thereby; as in a case where South Sea Stock was by Statute converted into annuities. (*t*)

A bequest of specific bills of exchange, drawn and accepted by the E. I. Company, was not adeemed by their paying the same, according to their usual course in rotation. (*u*) And where a testator bequeathed a sum of 500*l.* to A., *viz.* 400*l.* due from B., and 100*l.* in money, and afterwards received part of the sum due from B., and took his bond for the residue, this was

(*p*) *Le Grice v. French*, 3 Meriv. 50.

(*q*) *Wetherby v. Dixon*, 19 Ves. J. 407. *Coop. C. C.* 279.

(*r*) *Dingwell v. Askew*, 1 Cox. C. C. 427.

(*s*) *Ibid.*

(*t*) *Partridge v. Partridge*, Ca. temp. Talb. 226. *Bronsdon v. Winter*, Ambl. 57.

(*u*) *Coleman v. Coleman*, 2 Ves. J. 639.



held no ademption. (x) So if rent in arrear be bequeathed, and afterwards received by the testator, the legacy has been held unadeemed, (y) though the reason given by the Court that the rent might be in danger does not appear very satisfactory.

If the subject of a specific legacy be not in the testator's possession at the time of his death, it is of necessity an ademption, or repeal, of the bequest. As if A. bequeath to B. his black gelding, and afterwards gives him away, or sells him, the bequest is annulled; and though he afterwards buys another, such new purchased horse will not pass by the previous will. (z) And so the removal of a thing expressed to be in a particular place will operate to adeem the legacy, where the situation is part of the essential description. (a)

Where the subject of a specific legacy is not in the testator's possession at his death, the legacy is gone.

But this last proposition is subject to much modification; such change of situation being no ademption where from the nature of the place permanency could not have been expected,—where locomotion is characteristic of the thing,—where the habit of the testator has been to change its location,—or where in short the change or removal is consistent with the natural inference of continued disposition in the testator to give the legatee the same benefit.

Modifications of the above proposition.

Thus a bequest of goods on board a ship is not adeemed by the testator's removing them out of the ship before his death. (b) So where a testator who having two houses, and but one set of plate, linen, and furniture, had been in the habit of removing these articles with him when he went from one house to another, made his will when at his house at A., and bequeathed all his plate &c. in his house at A., together with the lease of

(x) *Orme v. Smith*, 2 Ves. 681.

(y) *Ford v. Fleming*, 2 P. Wms. 470.

(z) *Wentw. Off. of Ex.* 23.

(a) *Shaftsbury v. Shaftsbury*, 2 Vern. 747. *Heseltine v. Heseltine*, 3 Madd. C. R. 276.

(b) *Chapman v. Hart*, 1 Ves. 273.

his said house ; but died at his house at B., while there with his furniture : it was held that the legacy was not adeemed by such removal. (a) And it has been held, where a partner in a trade bequeathed his share, and afterwards renewed the partnership with a variation of his interest in the concern, that the bequest was not adeemed. (b)

Conversion  
of a raw mate-  
rial into a ma-  
nufactured  
article.

A conversion or specific alteration of the thing bequeathed, as making a raw material, after giving it by will, into a manufactured article, seems to be a clear practical revocation. (c) By the Civil Law it was competent for a man, after he had changed the subject of a specific legacy, to declare by his conduct that such a change was no ademption : and the case has been put of a gold chain, which the testator, after having bequeathed it by his will, converted into a cup ; whereby the legacy was not adeemed because the cup might be restored to its former shape. This distinction, however, has not been adopted by our law ; and Lord Thurlow has declared it to be contrary to common sense to say that, after a legacy has been extinguished, the testator may by his conduct revive it. (d) (3)

A legacy to  
an executor is  
annexed to the  
office.

Where a legacy is left to an executor, or to one by name, who by the same will is appointed executor, whether the legacy is given to him expressly for his care and trouble in the execution of the will, or not, to entitle himself to the legacy, he must take upon himself the charge of the will, at least in general cases. If therefore, where a legacy has been left by will to a

(a) *Land v. Devaynes*, 4 Bro. C. C. 537.

(b) *Backwell v. Child*, Ambl. 260.

(c) 2 Bro. C. C. 110.

(d) *Ibid.*

(e) *Roach v. Haynes*, 8 Ves. J. 593.

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(3) If the words of Lord Thurlow are correctly reported, his criticism on the distinction seems not to have been just. His reason was grounded on the supposed absurdity of holding a legacy which was extinguished, to be *revived* by the conduct of the testator : but the rule of the civil law did not admit the legacy to have been extinguished.

person also named executor, his appointment is revoked by codicil, the bequest is also impliedly revoked together with the office.

Marriage and the birth of a child or children, unprovided for, will, in the case of personal as well as real estate, operate together to revoke a prior will, unless by such will provision was made by the children of a former marriage. (*f*) But marriage alone, without the birth of a child, will not revoke a previous will. Nor, in general, will the subsequent birth of a child or children alone so operate. (*g*) And even the implication furnished by marriage and the birth of children may give way to circumstances.

Marriage and the birth of a child a revocation.

Thus where a man made his will, and thereby bequeathed several legacies, and appointed his wife residuary legatee; and the wife died, leaving several children; and the testator married again, and had one child by his second wife, and afterwards perished by shipwreck, together with his wife and all his children: it was decided by Sir W. Wynne, the Judge of the Prerogative Court, that the will was not revoked.

As the circumstances of this case are peculiar, and many important principles occur in the argument, it shall be presented fully to the reader. (*h*)

George Netherwood, after his marriage with his first wife Elizabeth Lomax, made a will whereby, after charging his real estate with the payment of his debts and legacies, if his personal estate should be deficient, he gave some pecuniary and specific legacies, and bequeathed the residue of his personal estate to his wife. He also devised his real estate to his wife for life, with remainder to one George Netherwood, and appointed an executor for his effects in England, and another executor for his effects in the

(*f*) *Skeath v. York*, 1 Ves. and B. 397.

(*g*) *Shepherd v. Shepherd*, 5 T. R. 51. n.

(*h*) A note of this case of *Wright v. Netherwood* will be found in Mr. Evans's edition of Salkeld's Reports. The Author has also a pretty correct one in MS. in his own possession.

West Indies. His wife died leaving several children ; the testator married her sister, and had issue by her, one son. He afterwards embarked for England from Jamaica, with his second wife, her son, and all the children by the former marriage. The ship in which they embarked was never afterwards heard of, and was admitted to be lost.

The will was proved by the executor in England ; and, by the inventory of the property belonging to the deceased, it appeared to amount to about 8000*l.*; the legacies amounted to rather more than 200*l.*

The executor who proved the will was afterwards cited by the next of kin to prove it in solemn form, or to shew cause why it should not be declared invalid.

Sir William Scott and Doctor Nicholl on this occasion argued in support of the will. They contended that in this case it was not revoked by the second marriage and birth of a child. That although it might be admitted as a general principle that these events did revoke a will on the presumption that upon such a total alteration of his situation the testator did not continue to have the same intention, yet that such presumption was liable to be repelled by circumstances ; and that if it appeared to be his intention that the will should stand, marriage and the birth of a child would not destroy it. They observed that all presumptive revocations were *stricti juris*, and must be wholly inconsistent with the deceased's intention to dispose of his property according to his will. That the general principle of these revocations is, that where a person has contracted such new obligations and relations, it could not be supposed he meant to adhere to his former disposition : that this principle was recognized by all the cases upon the subject ; and that they all proceeded upon the ground of a *total alteration* in the testator's circumstances ; but that if there were not a total alteration, the implication was repelled.

No case, they said, could be stronger against a revocation than this. When the deceased was married,

he made a will by which he bequeathed some small legacies, and disposed of the rest to his wife. This, they observed, might have been in confidence that she would take care of any children he should have by her. By the death of the wife the residue became lapsed. And on his second marriage his fortune would have taken the same course in point of substance as if he had made no will. The few legacies would have belonged to persons to whom they were given, and the residue would have been the subject of the statute of Distributions.

They mentioned cases in which it had been held that this alteration in circumstances did not amount to a revocation, as, where the will was not of such a description as to make the Court say the testator could not in duty adhere to the disposition which he had made. Such was the case of *Brown v. Thompson*, (*l*) where it was held that the alteration in circumstances was not sufficient to amount to a revocation; for no injury was done to any person, and those whom the testator was bound to provide for were taken care of. That case they contended was the same as the one in question; the great bulk would go to the wife and children; all the new relations were fully satisfied, that there was no probability of the testator's not intending to adhere to his former disposition. In *Brady v. Cubit*, (*m*) it was said by Lord Mansfield, "that upon his recollection there was no case in which marriage and the birth of a child had been held to raise an implied revocation where there had not been a disposition of the whole estate," This they contended, although it might not be essential, was certainly very material. Presumed revocations might exist where the residue was very small: but it was otherwise where a small part only was disposed of, and the bulk remained. In *Thompson v. Shepherd*, mentioned in a note to *Ambler*, (*n*) it was held that marriage and having children did not amount to a revocation of a will made by a widower who had

(*l*) 1 Eq. Ca. Ab. 413.(*m*) Dougl. 31.(*n*) P. 490.

children. It was not that complete alteration of circumstances which implied the revocation of a declared intention. A case of *Calder v. Calder*, lately decided in the Prerogative Court, they said did not apply, as it depended upon its own circumstances; and there was no ground to presume that the testator adhered to his intention. That was the case of a will made by a widower having no children, and which had no view to the relations of husband and father. The great bulk of his property was left away, and there were declarations shewing his idea that his property would go to his wife and children upon a marriage subsequent to the will; and the will itself was such as would have involved the family in endless litigation. Every circumstance in that case raised the implication that the will should be revoked: but no such circumstances existed in the case under consideration; on the contrary, every circumstance repelled the implication. They further urged that there would have been a very considerable provision for the wife and her child, and that it must be presumed the testator knew the operation of the will; that it disposed of the small legacies according to his intention; that the residue would be distributable according to law; and that his property would be managed by the respective persons in whom he had reposed a confidence for the purpose.

Upon another part of the case, *vis.* whether, supposing the will revoked, it was restored by the presumable survivorship of the father, the advocates before-mentioned observed that, in cases where the parent and son perished by the same stroke of death, and it could not be ascertained which was the survivor, the Roman law presumed, with certain exceptions, that if the son had not attained the age of puberty, the father survived; but if the son had attained that age, that he survived the father. This presumption, they said, arose from the degree of strength supposed to belong to the respective parties. Applying this general rule of presumption to the present case, they contended that the

child by the second wife, being only about a year old, must be taken to have died before the father.

They further stated that, by the Roman law, a will revoked by the birth of a posthumous child did not revive by his death, because no change in the father's intention could in that case be presumed; but that it was held otherwise with respect to the *quasi posthumi*, or those who were born after the will in the testator's life-time, on whose death the will was restored by the Prætorian law, as upon a new designation of intention. That there was no case where it had been held by the English law, that under these circumstances a presumptive revocation did take place. That the presumption of the law of England, with respect to revocations, was not more strong than the *agnatio sui hæredis*, by the civil law; nor so strong, for that was an actual revocation, and the other only a presumption liable to be repelled. That by the Prætorian law it was held that upon the death of the agnatus the will was restored; and that the removal of the cause in the present case would as strongly imply a renewal of the first intention, or rather more strongly, on account of the omission to destroy the will.

And, lastly, it was said, that, at all events, the testator intended the legacies, on account of which alone the dispute was material, should be carried into effect; and that the executors whom he had appointed should have the management of the property; so that if the Court upon a presumed intent decided against the will, the actual intention of the testator would be defeated.

Doctor Battine and Doctor Swabey on behalf of the next of kin insisted on the general rule that a will is revoked by marriage, and the birth of a child. They contended that the change in the testator's situation, from being a widower to becoming again a husband and a father, was such a total change as to raise the presumption that he did not intend the will to stand. That it had been decided by Sir George Hay that the cases of widower and bachelor were the same. That



there was no decision that the quantity of property would vary the presumption.

With respect to the case of *Brown v. Thompson*, they observed, that it came on first before Sir John Trevor, Master of the Rolls, who held that the will was revoked: that the different opinion afterwards given by Lord Keeper Wright was on account of the particular circumstances of the case; and that Mr. Justice Buller, in *Doe v. Lancashire*, thought the opinion of the Master of the Rolls better than that of the Lord Keeper. They admitted that there was a *dictum* of Lord Mansfield in the case of *Brady v. Cubit*, that a will was not revoked by marriage and the birth of a child if it only covered part of the property: but they observed that it was a *dictum only*. That in *Doe v. Lancashire* the revocation was held to arise from a tacit condition at the time of making the will; and that although there might be some cases in which a will was allowed to stand from circumstances repelling the presumption, yet nothing was more dangerous than to let a particular equity arising from the quantity of the effects operate against a general rule of law, as it would introduce a vague and uncertain method of decision, and it was better to adhere to a known presumption of law. In this case, they said the disposition was complete by the will, both as to the real and personal estate; and the testator had not shewn, since the alteration in his circumstances, any disposition to adhere to it. And though the real estate was not within the jurisdiction of that Court, the fact of its being wholly devised away might afford an argument in favour of the revocation.

As to the other point, they contended that it was not to be taken for granted in this case, even according to the principles of the Roman law, that the child died first. That the doctrine alluded to went no further than to shew that, when a father and son perish by the same stroke of death, the father is supposed to survive his infant son. But that it did not appear that in this



case they perished by the same stroke of death. The ship being cast away was all that was admitted, and *non constitit* that they died by shipwreck. They insisted that the general law being that the will was revoked, to take the case out of that law, the revival of the will by the father's surviving must be shewn by the other side. That, by the Roman law, if a will was void for the pretermission of a child who afterwards died, the will was not thereby rendered valid; or if it was revoked by the birth of a posthumous child, the death of that child did not restore it; and in case of a will becoming void by any subsequent cause, the removal of that cause did not restore it by the civil law; though it was otherwise by the Prætorian law, which was in the nature of a Court of Equity, and only prevailed for the sake of the *hæres scriptus*, or residuary legatee. That in this case the residuary legatee being dead, the ground on which the *jus prætorium* interposed failed. That any particular legatee had the advantage of its revival *incidentally*, as it was allowed to stand on account of the general *hæres scriptus*. They also contended that, even supposing this case were to be decided by the Roman law, and the will were to be restored by the survivorship, it could not be restored in the present instance, for no alteration in the father's intention could be presumed to have taken place after the son's death; and it was only upon such presumption that after an *agnatio sui hæredis* the will was by the *prætorian* law restored. That if the father did survive a few minutes, there was no room to suppose he had time to change his intention. But they observed that the doctrine of revival was no part of the civil law which had been adopted by the law of England. They adverted to a case of *Barrow v. Baxter*, which had been decided in that Court, and was mentioned in *Ambler*, 491. in which case, it appeared from the register that the wife brought no fortune and had a settlement, and that there was a child who died before the testator, and yet the will was held to be revoked.

As a matter of general learning, they further observed that the Roman law was not adopted in these cases by the law of England, for they 'essentially differed from each other in many respects.

The learned advocates on the other side, in reply to these arguments, contended that the civil law, upon the grounds which had been already argued, was clearly in favour of the will. That the Court would not attend to distinctions between *jus prætorium* and *jus civile*.

That *jus prætorium* was just as much a part of the general system as any other; and that, in fact, it was the predominating and over-ruling authority. As to the case of *Barrow v. Baxter* they said it was certainly contrary to the civil law, and that it did not appear that those points were adduced which in this cause had been urged in support of the will. With regard to the distinction which had been made between the *hæres scriptus* and a special legatee, they observed that the latter was as much intended to be benefited as the former. That it being the established law that the death of the *quasi posthumi* revived the will, the distance of the interval between his death and that of the testator was not material against the presumption of law; and that the Court was not to examine by evidence whether there was an actual change of intention or not.

They contended that the law with respect to revocations by marriage and the birth of a child was, as laid down in *Brady v. Cubit*, a mere principle of presumption. That in such a case all the circumstances were to be taken together, and that the state of the property might be very material. That it was extraordinary if there were any decision that a paper disposing of small legacies would be revoked by subsequent marriage and birth of a child, that no such decision should appear. That though the Courts had not gone the length of Lord Mansfield in *Brady v. Cubit*, by deciding that a revocation did not take place if any property were left, yet that there was no case where mar-

riage and the birth of a child had been held to amount to a revocation where the will was such as might have been made, after these relations were contracted, fairly and without injury to the family. The disposition in the will in question, they said, extended only to a small property, and might have been fairly made by a person having a family, the lapsed residuary bequest being as if it had never existed; and they contended that, the testator having no wife or children at his death, the tacit condition (which in *Doe v. Lancashire* was considered as the principle of those cases) might be fairly considered as a condition that the will should not take effect if the testator should afterwards have a wife and children *who survived him*.

It was further urged by the same advocates, that all the cases in the Courts of Common law admitted that the doctrine upon that subject was borrowed from the civil law. That the Courts had not adopted all the minute rules and distinctions of that law, but only some of its general principles; and that there was no principle better founded on justice than that, if a will was revoked by the birth of a child, it was revived by his death in the life-time of the testator.

Sir William Wynne, in delivering the judgment of the Court, observed, it was clearly the general law that by marriage and the birth of a child the will became void by implication of law. That he thought it was a mistaken notion that there was any such distinction as that mentioned by Ambler. (o) That the principle of the rule was, that the change of circumstances founded a presumption that there was a change in intention which might be as strong in favour of a second wife and family as a first, and that it did not seem material whether the will was made by a widower having children, or by a bachelor. He said that the more weighty argument was drawn from the operation of the

(o) P. 490, in Margin. See *ante*.

will under the circumstances which had happened. That the testator had given legacies which were not very considerable, and the rest to his wife. That the gift of the residue became void by her death ; so that if he had left a second wife and son, they would have had their share with the other children. That in *Brady v. Cubit* it was said by Lord Mansfield that there was no case of a revocation where there was not a total disposition ; intimating that the ground of revocation was an entire deprivation ; but that, however that might be, if there was an ample portion remaining, after a few legacies to friends, there was no decision that a will would be revoked, and that the principles on which the cases had gone did not militate against such a will. This case, however, he said was not exactly similar. The testator gave the bulk of his property to his wife early after marriage. She lived for several years, during which they had several children born. The birth of those children would not have revoked the will, and he might have meant to leave them in the power of their mother. She died ; and it was not an improbable supposition, that he, knowing the effect of the will, suffered it to remain. There was a strong ground then to contend that under those circumstances the case did not fall within the rule laid down and established for the revocation of wills.

The learned Judge said, he was not aware of the case of *Barrow v. Baxter*, in which the Court seemed to think the subsequent death of the child would not make an alteration ; but he said the point seemed very much like that which had been a *vexata quæstio* in those courts, and brought before the Courts of Common Law, whether a will which was revoked by another is set up by the destruction of the second. That there was a case to that effect before Sir George Lee, of *Hellyer v. Hellyer*, in which it was held that the will being once revoked, remained so, but that there was an appeal from that judgment to the Delegates, which was never de-

terminated by them; and that the case of *Glazier v. Glazier* (*p*) was directly contrary to that, it having been there held that the first will was good. That in *Brady v. Cubit* it was laid down by Buller, J. that implied revocations must depend on the circumstances at the time of the testator's death, and that made it material to enquire what those circumstances were. That the fact was, that having embarked, they all perished. The Roman law, he said, had been entered into; and it clearly appeared by the *Prætorian*, which was considered as the latter Roman law, that the revocation was entire, and not presumptive; and yet the will was held to revive. With respect to the priority of death, he stated that it always had appeared to him more fair and reasonable in those unhappy cases, to consider all the parties as dying at the same instant of time, than to resort to any fanciful supposition of survivorship on account of the degrees of robustness. Then the testator at the time of his death had neither wife nor children; and Buller, J. said it was to depend upon the circumstances at the time of the testator's death; and there was no circumstance to raise a presumption that he intended at that time that the will should be revoked.

On the first point, the learned Judge declared he should have great doubt whether the presumed revocation did take place at all.

As to the second, as there were neither wife nor children at the death of the testator, he was clearly of opinion that the Court ought to pronounce for the validity of the will.

That the birth of children will not alone operate to revoke a will is well established, as a general rule; on which point the leading case is *Shepherd v. Shepherd*, which was shortly this: *Shepherd* the testator, after some small legacies to his collateral relations, made his wife his residuary legatee. After his will, his wife was brought to bed of a daughter, in 1763, upon whose birth the testator added a codicil to his will, whereby he di-

rected that the legacies should be void, and that an annuity of 300*l.* should be secured upon the residuum, and paid to the daughter. The codicil and will were found together. In 1765, another daughter was born; and in 1768, a son, who was a posthumous child, the testator having died six months before his birth.

These two last children being unprovided for, a suit was commenced in equity, to set aside the will, and for a decree of intestacy: and the question sent out of Chancery by Lord Camden, for the opinion of Sir George Hay, Judge of the Prerogative Court, was, whether the subsequent birth of children was a revocation of the will. That learned civilian, after stating it to be an incontrovertible position, settled by an abundance of cases, that marriage alone would not revoke, held that so the birth of children alone would not, *unless under very special circumstances*; and accordingly decreed the probate to the executor.

But as the revocation implied from the union of the two facts marriage and the birth of children, is still only grounded on presumption of intention, strong indeed, but liable, at least, in the case of wills of personality, to be encountered by circumstances indicating with greater strength of probable inference a contrary intention; so the rule against a revocation of a prior testament by the subsequent birth of a child or children only may, though of general prevalence, give way to inferences arising from very special circumstances, as seems to have been allowed by Sir George Hay, in the last-mentioned case of *Shepherd v. Shepherd*.

The doctrine on this subject is largely propounded in the late case of *Johnson v. Johnson*, in the Prerogative Court. (b) James Johnson made a will on the 21st July, 1793:—he was then resident in the island of Jamaica; and had two children, a girl and boy, and his wife was pregnant. By this will he bequeathed

(b) 1 Phill. 477.

“ 10,000*l.* to his daughter; 10,000*l.* to the child of which his wife was ensient; and, if more than one, then 10,000*l.* to each, and the residue of his property to his son.” He quitted Jamaica shortly after the making of this will; and returned to England, where he continued to reside till his death; which happened suddenly, on the 3d of July, 1815, at his house in Wimpole Street. He had four children born subsequently to the date of his will: and his personal property at the time of his decease amounted to 300,000*l.* His widow was possessed of a considerable landed estate in fee. The will of the 21st of July, 1793, was propounded by the widow, who was one of the executors under it. The three youngest children, who were minors, appeared by their guardian, and prayed an intestacy.

At the time of the death of the deceased, the will of the 21st July, 1793, was in the custody of his agent, at Jamaica: but in the *pigeon-hole* of an *escritoire* in the library, in Wimpole Street, was found a will bearing date June, 21st, 1793, originally prepared for execution; but afterwards altered in several places by the deceased, and obviously used as a draft for the will of July 21st., 1793. There was also found within the blotting paper leaves of a writing book in the same *escritoire* the sketch of a will in the deceased's own handwriting, without date or signature, written on the back of a printed letter from the West India dock-house, which letter was dated 6th of July, 1814. And, lastly, there was in the same *escritoire* a will made prior to his marriage; and dated Charleston, November 30th, 1782. The question turned upon the birth of the three children, born subsequently to the date of the will, dated July 21, 1793, for whom no provision was prospectively made thereby; and upon the legal operation of that circumstance on the said will. It was admitted, that marriage, or the birth of children, standing quite *alone* would not revoke a will;—that that was a safe general proposition, and might be considered as an established



rule of law : but the question in this case was whether the birth of children, strengthened and supported by other circumstances, such as those which occurred in the present instance, might not, together, produce the effect of a revocation. The alteration of circumstances were principally these :—The time since the making of the will was twenty-two years ; during which the fortune had been augmented from 20,000*l.* to 300,000*l.*, and the family of the testator from two children to six.

Sir John Nicholl, after setting forth the facts of the case, observed that the principle or character of the deceased's testamentary disposition of his personal property was to provide amply for his younger children ; for whom he was so anxious to discharge that duty, that he had provided for the child or children of which his wife might then be pregnant, and that the effect of the will, if it were to be considered as unrevoked would, under the residuary clause, be to carry 280,000*l.* of the personalty to the eldest son, in total exclusion of the three youngest children, who would be left entirely unprovided for ;—a consequence which, in his opinion, would be totally inconsistent with the spirit of the testator's intentions in making such will.

He further noticed that the will was not in his possession so as to give him the opportunity of cancelling it ; and that it was admitted that, for the afterborn children, the deceased always shewed as much affection as for those provided for by the will. That it had appeared also in evidence that so far from having the slightest intention that the will made in Jamaica should operate, he had acceded to the representations of his wife and others as to the propriety of making a new will, saying, that it was time enough to make a will, but that he would take care of that. The learned judge remarked that parol declarations were always to be received with great caution, being in



general the lowest species of evidence ; but that these confidential communications with his wife, upon her serious representations to him upon so important a subject, were deserving of rather more weight ; though even in these declarations the Court would be cautious in placing much reliance, if they were not confirmed by something more unequivocal and solid coming from the deceased himself in a different shape, and not open to any of the same objections.

The subsequent paper found in the escritoire, though it could not operate as a new will, not being in dispositive terms, nor was *per se* sufficient as a revocatory paper, was nevertheless a circumstance of evidence tending to shew, that the deceased did not mean the will made at Jamaica to operate ; and he noticed the fact that the deceased died suddenly of apoplexy, having the intention in his mind of making a new will.

In conclusion the Judge having laid down as law,—*first*, That implied revocations are not within the statute of Frauds ; *Secondly*, That marriage and birth of children do together amount to an implied revocation ;—*Thirdly*, That marriage, without birth of children, does not amount to an implied revocation ;—*Fourthly*, That the subsequent birth of children is not alone, and without other circumstances, an implied revocation ; observed that the point remaining for consideration was, whether the subsequent birth of children accompanied by other circumstances such as those in the present case, and leaving no doubt of intention, would or would not raise the implication of law :—or, in other words, whether the circumstance of subsequent marriage concurring with the subsequent birth of issue was an essential ingredient ;—a *sine qua non* in order to produce an implied revocation.

On this subject he was of opinion that revocation by marriage and issue stood, in point of authority, not

upon any ancient rule of law ; nor upon positive enactment ; but as the result of decisions of Courts of Justice, even against strong words of positive law ; *viz.* the Statute of Frauds ; yet founded certainly on sound principles of substantial justice.

The rule itself rested upon presumption arising from such an alteration of circumstances as created new moral duties subsequent to the will, so as to compel the inference of an intention to revoke.

Upon these grounds he could not help thinking that the concurrence of marriage was not an essential part ; and that the birth of children, after the making of a will by a married man, may have imposed as strong a moral duty upon him, forming the groundwork of presumed intention, and may be accompanied by circumstances furnishing as indisputable proof of real intention as if the will had been made previous to the marriage.

Upon the whole the learned Judge decided that the circumstances occurring in the case before him furnished decisive evidence of an intention to revoke ; that the combination of circumstances were as strong as could well be imagined, tending to shew that it was the intention of the deceased not to adhere to the old will, which he had made, under very different circumstances, twenty years before. He therefore declared that, under all the facts of the case, taking the subsequent birth of issue as the essential basis of the proof, and accompanied as it was by the other concurrent circumstances, he was of opinion that the intention of the testator was plain ; and that he was warranted in law and justice to pronounce against this will upon the ground that it had been revoked.

Although the implied revocation by a subsequent marriage and the birth of issue stands upon the ground of presumption, and is therefore capable of being rebutted by evidence of circumstances tending to a contrary inference, yet the circumstances must be

very strong, clear, and unequivocal, to prevent the consequence from such a concurrence of facts; and it has been said by authority (e) that "to shew that the deceased adhered to or meant to revive the will, there must be some act, or at least some declaration clearly referring (after the change of circumstances) to the will, as an existing will, intended to operate."

In the case of *Hollway v. Clarke*, referred to below, it was held that marriage and birth of a child was a presumptive revocation of a will made by a widower, and in favour of children of a former marriage, so far as respected the personalty, over which alone the ecclesiastical Court have jurisdiction. There were in the case grounds of conjecture to oppose the revocation, but no act or declaration to shew that the deceased had considered the will as an operative will.

And in the case of *Emerson v. Boville*, (f) marriage and the birth of a child was adjudged a revocation of the will of a widower, made prior to a second marriage. Notwithstanding the child died in the lifetime of the testator, Sir W. Wynne declaring that the will would not be restored, unless it was republished, or revived by some act.

(e) By Sir John Nicholl, in *Hollway v. Clarke*, 1 Phill. 341.

(f) 1 Phill. 342.

## SECT. III.

*Satisfaction in Equity.*

A few words may be added in this place on the equitable doctrine of *Satisfaction*, as having an affinity with the subject of these volumes, though we shall not enter at large into the consideration of the cases.

This word *Satisfaction*, from its frequent and too vague adoption in Courts of Equity, seems to have introduced some confusion of ideas; and we may venture to question whether it is often used with technical precision.

By considering what it is not, we shall perhaps be soonest conducted to the true apprehension of what it really is. Lord Thurlow declared himself to have met with continual disappointment in his attempts to establish a broad and useful distinction between cases of satisfaction and performance. Since, however, we are forbidden to treat these terms as synonymous by the rules of construction which have separated them in application, we must not be discouraged, even by his Lordship's disappointment, from attempting an approach at least to some practical grounds of discrimination.

To the class of cases called cases of performance, as far as the decisions appear to have gone, those seem properly to belong, wherein a man, being under a covenant to do something which is to take effect after his death, does an act in his life-time, or leaves a consequence to arise after his death which virtually includes, or is, *in substance*, the thing intended. Thus in *Blandy v. Widmore*, (a) where a man, covenanted to leave his wife 620*l.* and died intestate, and the wife's distributive share came to more than 620*l.*; and in *Wilcocks v. Wilcocks*, (b) in which a man on his marriage covenanted to buy lands to the value of 200*l.* *per annum*,

(a) 1 P. Wms. 323.

(b) 2 Vern. 558.

and to settle them by way of strict settlement, and afterwards purchased lands of that value, but made no settlement, and died, and left the purchased lands to descend to his eldest son, the eventual benefit in both these cases operated as a presumed *performance*, and not as a *satisfaction* of the engagement. (c) It is true that, in *Wilcocks v. Wilcocks*, the eldest son took by the event a fee simple instead of an estate in tail, but *he* was not the person to take an objection on *that* ground; and Sir Joseph Jekyll, in observing upon this case, (d) declared his opinion, that if the eldest son had aliened the fee, and died without issue, the second son could not have recovered the estate by virtue of the settlement; which observation, if just, furnishes a strong distinction between a case of *performance* and a case of *satisfaction*; for as a *satisfaction*, it is very clear it could have only bound those (1) by whom the benefit was felt. (e)

In cases of this class, though the intention may not be manifested in expression, yet if no contrary grounds of inference exist, the thing intended or engaged to be done being *in effect* performed, the presumption against double portions or provisions prevails. (f) It seems, indeed, that if the effect of the thing be partly performed, such partial performance fulfils the obligation *pro tanto* in equity: thus where a sum of 30,000*l.* was covenanted by a man, on his marriage, to be laid out in land to be settled on himself for life, with remainder to his first and other sons in tail, and the covenantor died, having laid out only a

There may be  
*performance*  
*pro tanto.*

(c) *Lee v. Cox*, 3 Atk. 419. (d) 3 P. Wms. 225.

(e) Vide *Wilson v. Pigott*, 2 Ves. 355.

(f) Vide *Weyland v. Weyland*, 2 Atk. 632. *Prince v. Stebbing*, 2 Ves. J. 409.

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(1) The reporter, indeed, adds a query, whether, if the eldest son had died before the next term, so as that he could not have suffered a recovery, the second son ought then to have been barred of his chance under the settlement.

Constructive performance by a collateral act.

small part of that sum on the purchase of some land, which he left to descend to his eldest son, Lord Talbot decreed it a performance *pro tanto*. (g) So, also, the rule seems to be, that where a man covenants to do an act, and he does that which may be converted into a performance of his covenant, he shall be presumed in equity to have done it with that intention. Thus where (h) one covenanted by his marriage settlement with the trustees to pay to them two several sums, amounting to 2000*l.* to be laid out in land, to be settled to the uses of the marriage, and did not pay the same, but after having purchased an estate for 2,150*l.* died intestate, without having made any settlement of such estate, though it was strongly contended, that as the husband had covenanted to pay the money to the trustees, he could scarcely mean a performance when he purchased land himself, yet his Honour declared, after admitting that if the case had been *res integra* he should have thought the reasoning made use of entitled to great consideration, that the case was within the principle of *Lechmere v. the Earl of Carlisle*.

The constructive performance must correspond in time with the stipulated benefit.

But it seems a settled rule, that to constitute a performance the eventual benefit must correspond in time with the period at which the stipulated benefit was to take place: thus, where a testator being under a bond to leave 300*l.* to be paid in one month after his death, bequeathed a legacy of 500*l.* to be paid in six months, this was held to be no performance. (i)

The true reason of the difficulty which has been so often confessed of separating cases of performance from cases of *satisfaction* seems to have arisen from the want of annexing a just idea to the word *satisfaction*, which is, in truth, a term of loose and general signification,

(g) *Lechmere v. the Earl of Carlisle*, 3 P. Wms. 227.

(h) *Snowden v. Snowden*, 3 P. Wms. 227. *in notis*.

(i) *Haynes v. Mico*, 1 Bro. 129.; and see *Richardson v. Elphinstone*, 2 Ves. J. 464. See *Garthshore v. Chalie*, 10 Ves. J. 1.

according to the use which has been always made of it in the courts of equity ; and has been adopted popularly to express the final and substantial effect, as well of cases of *performance*, as of cases of *election*, and cases of *ademption* or *revocation*, which are the terms truly expressive of the distinct means and operations of law, by which the result described by the word *satisfaction* is severally produced. It would, it is conceived, be very difficult, if not impossible, to suggest an example of a pure case of satisfaction, if we treat the term as having an exclusive and appropriate sense, and not rather as generically comprehending certain specific varieties of equitable rules and technical consequences.

Every case upon a will made by a person under a binding contract, unless it be considered as an actual performance, can only amount to a case of election ; for how can a testator by his will forcibly substitute *another* thing in the place of *that* thing which he was bound by his contract to perform ; or how can such a substitutionary disposition have any other operation than, by giving a better thing in lieu of the thing contracted for, to engage and ensure the choice of the devisee or legatee, on highly presumable grounds of preference ? If such a case is termed a case of *satisfaction*, it is because such is the final consequence of an *election* ; for it may be presumed almost as certain that, where a greater is proposed in the place of an inferior benefit, the condition will be accepted. In strictness, therefore, this is a pure case of election, or of *satisfaction working by election*.

Satisfaction is the *general* term, expressing the final effect of performance, election, and revocation.

Payment is performance. Thus where a legacy is bequeathed to a creditor, equal to or exceeding the amount of the debt, the debt is considered as meant to be answered by, or included in, the gift. This is, therefore, a *satisfaction by performance*. (2)

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(2) In treating of legacies this rule of presumption is more largely considered.



Where a man, having granted a benefit or provision by a voluntary and revocable instrument, by a subsequent instrument makes an advancement of some other bounty or gratuity, by way of provision, to the same object (3), and the circumstances of the case warrant the inference that the second provision was meant to take place of the first, this is not properly a case of satisfaction. A satisfaction it *ultimately* may be: but the true operation of it is to *revoke* or *adeem* the legacy: the term *satisfaction* is only expressive of its ultimate effect in equity, since a smaller sum given in the lifetime may, under circumstances, annul a greater provision by will. (*k*)

And if a legacy of a larger sum can be wholly set aside by the substitution of a less, this cannot be called a performance, still less a satisfaction *by* performance, and less still a satisfaction *by* election: but there seems to be no impropriety or confusion of terms in calling it a *satisfaction* (meaning only thereby a discharge) *by revocation* or *ademption*. And this phrase is the more appropriate, because it is certainly not, in strictness of legal language, an *ademption* or *revocation simply*: it is a satisfaction working *by way of* revocation; for, in truth, it operates as a revocation on a principle of equitable presumption. (*l*)

It does not redound much to the accuracy of a science to multiply terms, and apply different rules to them, without first distinguishing between the different ideas to be implied by those terms: and, therefore, until the word 'satisfaction' has a more appropriate and exclusive sense, it will only perplex the subject to talk of cases of satisfaction as distinguished from cases of performance, cases of election, and cases of revocation.

(*k*) Vide *Hartop v. Whitmore*, 1 P. Wms. 680. *Shudall v. Jekyll*, Atk. 517. *Rosewell v. Bennett*, 3 Atk. 77.

(*l*) Vide *Ellison v. Cookson*, 1 Ves. J. 100.

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(3) The doctrines of equity on the subject of double portions will be considered more at large hereafter.



The idea which is meant to be conveyed by satisfaction, simply used, is neither descriptive of cases of performance, cases of election, nor cases of revocation. It is not descriptive of *performance*, because it is not used to signify the identical, or substantial, or virtual effectuation of the thing contracted to be done, but the *substitution* of one thing for another. And as there are only two sorts of cases wherein a *substitution* can take place, *vis.* where the thing to be done is voluntary, and where it is obligatory or resting in contract; in the former of which cases the satisfaction operates by *revocation*, in the other, by putting the party benefited to his *election*, the *final* consequence *only* of each operation is properly expressed by the word *satisfaction*.

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#### SECTION IV.

##### *The Doctrine of Relation.*

SOMETHING has already been said on the doctrine of relation, as it applies to this subject. It seems to call for a particular notice, as there is some apparent confusion in the cases upon wills which have turned upon it—a confusion which seems in some measure to have arisen from a neglect to advert to the different notions conveyed by the word ‘relation’ in our law. (1)

In the case of disseisin the relation is of a very forcible kind. By his re-entry the disseissee is circumstanced exactly as if he had never been disseised;

Difference as to the effect of disseisin and subsequent entry, where the disseisin is before, and where it is after the will.

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(1) It would be too much to undertake to introduce in this place a general explanation of the law on the subject; for being of great difficulty in itself, it is rendered more so by the want of an uniform principle in the decisions upon it. A short view of it, however, as far as it is connected with the revocation of wills, is called for by the present enquiry.

for the new possession unites so immediately with the former possession as to destroy the tortious estate, as well as all the legal effects of the tortious act. But it may, as we have already stated, be reasonably doubted, upon the strong words of the statute of Wills, and the established maxim of the law, which make the actual *having* either the estate itself, or an interest amounting to a *jus in re*, essential to the operation of a devise of land, whether, if *after* disseisin a devise be made of the land by the disseisee, and afterwards an entry be made by him, the relation be such as to make the will operate to carry the land. For it has been said that relation shall never operate to make an act good which was void for defect of power. (2) In the case of a disseisin after the will made, the deviser had the estate when he devised; the disseisin only broke the continuance of the ownership: but in the case of a disseisin before the will, the deviser had no estate, but a right of entry only when he made the devise.

In the case of disseisin after the devise made, the law seems to help and favour the relation on account of the intervening titles being tortious. For as this species of relation is a fiction, and all fictions of law are governed by the equity of the law, (3) the odiousness of

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(2) See Vent. 304. and see also 3 Rep. 29. Butler and Baker's case, that relation will, in many cases, help acts in law, but will never help acts of the parties, that is to say, make void acts of the parties good: and therefore if a man enfeoff an infant or *feme covert*, and then devise the land, and afterwards the infant or the husband dissent, such dissent without question shall have relation between the parties *ab initio*, to this intent that the infant or husband shall not be charged in damages, or receive any prejudice, but shall never make a void grant, gift, or devise, good by relation.

(3) In the case of the Attorney General v. Vigor, 8 Ves. J. 279. the reader will find an attempt made to reason by analogy from this case of disseisin and entry by the disseisee after will, to a case where after his will the testator exchanged the devised lands for others, and an eviction happened after the testator's death, so as to raise a title to

the wrong (4), induces such favour to the relation of the recovered right that the intermediate act is wholly obliterated and out of the remembrance of the law.

Whether a re-entry for a condition broken by an alienee, or performed by an alienor, restores the old estate so as to remove all consequences of the alienation, seems open to doubt. It does not stand quite upon the grounds of the case, just above put, of the disseisin, there being no wrongful act to aid the construction of relation. In the first volume of Roll's Abridgment (b) it is said, that if a man devise and then alien upon condition, and afterwards perform the condition, and enter and die, it seems the devise is revoked; though in a case mentioned in the Reports (c) of the same Judge, it is

Of the effect of a re-entry upon condition broken.

Whether if a testator aliens upon a condition after making his will, and then enters for the condition broken, the will is revoked?

(b) 617, Pl. 3.

(c) *Nicholas v. Simmonds*, 2 Roll. Rep. 462.

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recover back the exchanged property. Those who argued against the revocation contended that, as the attempted exchange had completely failed, the whole transaction was avoided, and the old estate was re-mitted, precisely as if it had never been out of the devisor: that there was an implied condition, upon the presumed title of the land, that if either party was evicted, there was a total end of the exchange, and the other party might enter: that it must be considered as only a parting with the possession without transferring any title; and that, as the old estate continued in the devisor, the devise was no more revoked than it would have been by the grant of a lease. But Lord Eldon, after admitting the perfect propriety of Lord Holt's opinion as to the effect of the re-entry after disseisin by the disseisee in his lifetime, adverted to a striking difference between the cases of disseisin and exchange, viz. that the disseisin was not the act of the party, but a wrong and violence done to him: neither did it escape his Lordship that even in the case of the disseisin, if the disseisee neglected to enter, his mere right to enter would not pass by the will, and that the case put by Lord Holt supposed the entry to be actually made; whereas in the case before him, as it stood upon the facts, the eviction did not happen till after the death of the party, so that the lands conveyed in exchange continued through the life of the party, and at the time the will became operative under the effect of that conveyance.

(4) Relation will not defeat collateral acts which are lawful, especially if they concern strangers, 13 Rep. 21.

said *arguendo* and without contradiction, that entry for a condition broken makes a man by relation in as of his first estate, just as if the possession had never been out of him. And whether the entry be for a condition broken, or on a condition performed, the principle must be the same. All agree that after entry, upon condition performed or broken, the party is in as of his old estate: but the doubt is whether it be not too strong to say that *he is in as if the estate had never been out of him*.

This effect can only be given to the entry by supposing it to work by the same forcible sort of relation which has been observed to take place in the case of the disseisin after will made, and a re-entry. And indeed it would seem to follow as of course, that if the entry could operate as a *continuance* as well as a *restoration* of the title, the will of the party would be made good by such entry.

If any forfeiture is incurred or privilege lost by the alienation, such forfeiture or loss of privilege continues, notwithstanding the alienor's subsequent entry for breach of condition. Thus if a tenant for life makes a feoffment and re-enters for a breach, he shall be tenant for life again, but still subject to the forfeiture. So if tenant by homage auncestrel had made a feoffment on condition, the uninterrupted continuance of the privity in the blood of the tenant was dissolved by the alienation, and after a re-entry for a breach the tenant would not have holden by homage auncestrel again. For the same reason also if a lord of a manor makes a common law conveyance of an escheated copyhold (which is an enfranchisement) upon condition, and re-enters for breach of the condition, no relation takes place to save the privilege, but the continuance of the custom is broken, and the estate returns without the right of regranting it as copyhold. (*d*)

(*d*) Co. Litt. Estates upon Condition.

These cases shew that though the re-entry for a condition broken restores the estate, it restores the estate affected and modified by the act of alienation; and that the law takes notice that it has been once out of the party; so that the weight of reasoning and analogy seems to be on the side of the above-cited *dictum* from Roll's Abridgment; since the inference from these examples is, that the return or restoration of the old estate upon an act of alienation does not imply an unbroken continuance of title.

From the same reasoning we may deduce a confirmation of the propriety of the decision in the case of *Goodtitle v. Otway*. For if we hold to the cases which say that if a man make a feoffment in fee to a stranger to the use of himself in fee, there though the old estate is said to return, yet it is not the identical estate, since it comes back first in the shape of the use, and then the statute carries the legal estate to the use which is in a manner a new purchase; (e) then the cases upon re-entry for breach of condition are much stronger, to shew the legal consequences of the estate's being once out of the party; for in such cases the identical estate does certainly return. At the same time it must be confessed that if we adopt the opinion that in the case of a feoffment to the use of the feoffor and his heirs, the old use was never drawn out of the party; the above cases upon re-entry upon condition performed or broken, seem not to rise so high as the doctrine which maintains a will to be revoked by an act which never disturbed the real interest of the devisor, but left that use (which before the statute of Uses was the proper equitable subject of devise) still remaining unchanged in the party conveying.

We come now to the stricter sort of relation, which, in its true notion, is that principle by which an act of law is made to date back, in legal consideration, to the

Of relation in its strict sense.

(e) 1 Roll. Abr. 615, 616.

time of some precedent act, so as to be regarded as the completion of that of which such first act was the proper beginning, and forming in conjunction with it one integral and consummate transaction of law. Thus it has been properly said, that where (*f*) the commencement, progression, and consummation of a thing are necessary to go together, all of them are to be respected. But the thing is to be considered as receiving its perfection from the first. So where divers acts concurrent go to constitute a conveyance, estate, or other thing, the original act shall be preferred; and to this the other acts shall have relation, as was said by Berkeley and Jones, Justices, in the case of *Harper v. the Bailiffs of Derby*. (*g*) But Lord Hobart has explained this sort of relation with most strength in the case of *Needler v. the Bishop of Winchester*, (*h*) on the question as to the relation of the enrolment of a deed to the king, where that profound Judge observed, “that there are certain relations which cannot properly be called fictions of law, but are real acts, compounded of some simples, which make not a complete or entire act till they come together, and then they make one perfect act working by their nature *ab initio*, even as others do that are in their nature single: but those things are properly fictions of law, that have no real essence in their own body, but are so acknowledged and accepted in law for some special purpose.” Of this sort of compounded act the case of a grant to the King, not perfected by enrolment, but which when the enrolment takes place has its effect not from or by the enrolment, but from and by the first act, is said by Lord Hobart to be an example; (*i*) of which kind also is a feoffment within view and a subsequent entry, which entry *dates back* in effect to the time of the feoffment. (*k*)

The same principle governed the opinion of the

(*f*) 3 Bulst. 11.

(*g*) Jones 428.

(*h*) Hob. 222.

(*i*) Plowd. Com. 31.

(*k*) Vid. *Parsons v. Pierce*, Pollexfen, 45.

bench, as to the second point, in Shelley's case (5), which turned upon the retrospect of the execution to the judgment in the recovery, so as to make the act consummate by relation, in the lifetime of the party dying between the judgment and the execution. And there it was said that the execution of every thing which is executory always respects the original act; and all make but one act or record, although performed at different times, for *causa et origo est materia negotii*. Upon the same principle stands the case of dower mentioned in Bingham's case, (6) that if a husband levies a fine with proclamations, and dies, and five years pass after his death, the wife is barred of her dower; for though at the time of the fine levied her title was not consummate, yet the law respects the first and original causes, viz. marriage and seisin.

Thus also, although a surrenderee of a copyhold has

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(5) 1 Rep. 106 b.; where, in the vigorous dialect of those times, the recovery is said to be the mother which conceived the use, and the fountain out of which it rose.

(6) 2 Rep. 93 b. Dyer, 72 b. 224. And note that the statute 32 H. 8. which gives an entry to the wife and her heirs against the alienation of the husband, helps the discontinuance but not the bar. See Co. Litt. 326 a. To understand this point, respecting the operation of the fine as a bar of dower, it is necessary the reader should know that where a person has neither a right *in presenti* or *in futuro*, at the time of the fine levied, he is out of the purview of the statute: for as the reporter, in his note to the case of Stowell v. Lord Zouch, Plowd. 373. expresses it, the purview is against those who have right at the time of the fine levied, or have future right afterwards upon cause arising before, to which future right wrong was done before the fine, or by the fine. Upon the foundation of this proposition, the learned reporter denies the case in the text, contending that in the case of dower the title wholly accrued after the fine viz. by the death of the husband; for he was of opinion that until the death of the husband no title was consummate, nor wrong done by the conusee in detaining the land from the wife; and that therefore the fine did not reach the title, inasmuch as it accrued upon cause wholly after the fine, the two first points, marriage and seisin, being of no moment without the third. But this opinion of Plowden is contradicted by all the books. See the English Plowden, 373.



Of the relation, in respect to copyholds, of the admittance to the surrender.

no estate in the premises surrendered until his admission, yet on being admitted he is in by relation to the surrender, from the date whereof his admission operates. Should the surrenderor die before such admission of the surrenderee, he dies indeed seised in law of the premises; and though his widow might, in strictness, claim her free bench, yet on the admission of the surrenderee that estate is defeated (8), together with all the mesne acts of the surrenderor. (l) And as all the mesne acts of the surrenderor would be defeated by this relation, so by force of the same relation all the mesne acts of the surrenderee would be confirmed; and accordingly the surrenderee, after admittance, in declaring in ejectment might lay the demise immediately from the surrender, (m) and recover mesne profits from that time. (n) On this ground it was, that in a case where a copyholder surrendered to the use of himself for life, with remainders over, and the ultimate limitation to himself and his heirs, and afterwards surrendered to the use of his will, and made and executed his will accordingly, and after such surrender and will made was admitted upon the former surrender, the will was held not to be revoked, because the admittance related to the time of the first surrender, and the whole transaction might be considered as one and the same. (o) And Lord Mansfield added, that this was the principal reason which the Court went upon in *Selwyn v. Sel-*

(l) *Benson v. Scott*, Carthew, 275. *Vaughan v. Atkins*, 5 Burr. 2764, 2787.

(m) 1 T. R. 600. *Holdfast and Wollams v. Clapham*.

(n) 2 Wils. 15. *Roe d. Jefferey v. Hicks*.

(o) 1 Blackst. Rep. 605. *Roe d. Norden v. Griffiths*.

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(8) Sir W. Jones, 451. *Parker v. Bleake*. It is to be observed that the relation defeats the widow's bench, because it prevents the husband dying seised, which (except where it is otherwise by special or local custom, for which see *Robinson on Gavelkind*, p. 172.) is necessary to ground the title to dower; and therefore an alienation by the husband to take effect in his lifetime bars the claim of the widow. Cro. Jac. 126. *Lashmer v. Avery*.



wyn ; (p) for, said his Lordship, after stating some other reasons of the judgment, the great and manly ground upon which the Court went in that case was that the deed, recovery, and all the whole transaction, was to be considered as one conveyance.

The substance of the case of *Selwyn v. Selwyn* was this :—A father, tenant for life, and son, remainderman in tail, executed a bargain and sale, which was duly enrolled, whereby they conveyed the entailed lands to a third person, to make him a tenant to the *præcipe* for suffering a recovery, the uses of which recovery were declared to be to the father for life, remainder to the son in fee ; and after the writ of entry was sued out, but before it was returned, the son made a will, whereby he devised the same lands to the father in fee, and died after the recovery was completed without revoking or altering his will. And the following question was proposed by the Lord Chancellor to the Court of King's Bench—"Whether the lands of which this recovery was suffered passed by the will?" The Court gave no reasons for their opinion, agreeably to the usage upon cases referred out of Chancery: but, according to Sir James Burrow, they repeatedly expressed their approbation of the case of *Ferrers and Curson v. Fermor and Others*; and therefore it is likely, says the reporter (who was confirmed by Lord Mansfield afterwards, as appears by the case abovementioned of *Norden v. Griffiths*), that they considered the whole as one conveyance, which must relate to the date of the bargain and sale, which was perfected, made absolute, and delivered from objections, by the subsequent ceremonies. (9)

(p) 2 Burr. 1135.

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(9) A writer of great knowledge in his branch of the profession, has observed, that until seisin no uses can arise under the recovery; and that consequently, until there is seisin in the demandant as the means of supplying the seisin to uses, the person claiming under the uses has no legal estate which will admit of an alienation by deed; but he has an inchoate interest which will allow of his devising his interest by will. The

The case in Cro. Jac., (q) referred to and approved in *Selwyn v. Selwyn*, was in effect as follows :—A lessor covenanted with his lessee for years, that a bargain and sale should be made, and a fine levied to the lessee and his heirs, to the use of him and his heirs, to the intent that a common recovery might be suffered against the conusee, with voucher of the lessor, who should vouch over the common vouchee, to the use of A. B. and his heirs; and after the bargain and sale, and fine and recovery were perfected, A. B. brought an action against the lessee for rent arrear; and the question was whether the lease was extinguished and destroyed by the deed fine and recovery? It was agreed, that if a fine or feoffment be made to a lessee for years, to the use of a stranger, it would not extinguish the term (10); for it was saved by the statute of Uses, which executed the

(q) 643.

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true ground, continues this writer, of *Selwyn v. Selwyn* is, that even before the recovery was suffered, the testator had in him a title to a future use, which gave him a power of testamentary alienation; and his will operated upon this use in its fiduciary state, and also on the estate itself, when the use was executed into the estate. He goes on to say that another ground of that case, and the ground to which it is more generally ascribed, is, that the recovery and the recovery deed formed one assurance.

It may be observed, however, in the above-cited case of *Norden v. Griffiths*, that Lord Mansfield, who presided on the bench in *Selwyn v. Selwyn*, declares, most emphatically, that the true ground upon which the decision in that case went was that which this gentleman seems not to admit to have had much share in producing it, viz. that the indentures, recovery, and the whole transaction, was to be considered as one conveyance. Indeed the other supposed ground seems very refined and fanciful, and stands but ill with the subsequent cases on the doctrine of revocation.

(10) If at the common law, before the statute of Uses, a termor took a conveyance of the premises in lease to him, to himself and his heirs, to the use of another, his own term was saved to him in equity. And observe that the Legislature did not, by the statute of H. 8. design to prejudice any rights or estates, but to preserve them; so that the operation of the statute would be at once to execute the use as to the reversionary interest, and to prevent the merger of the intermediate estate. See the case in Cro. Jac. 643.

use, and saved all rights, estates, and interests ; but as in this case the bargain and sale was made, and the fine levied, to the lessee to the intent that a recovery might be suffered, whereby certainly the term was drowned and extinguished for a time, until the recovery was suffered, (since during that interval, no use being raised, the saving in the statute of Uses did not apply to the case), whether the lease should be revived and recontinued by the recovery which raised the use, and so let in the statute, was the doubt? And the Court resolved that it should be revived, for the bargain and sale, and fine and recovery, were all but one assurance; and the recovery being suffered, which was grounded upon the covenant, was *quasi* a conveyance to the use *ab initio*. (11)

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(11) Of a similar opinion in respect to the relation in these compound conveyances to the first fundamental act, so as to carry back the title to the date of the leading instrument, were the two Judges, Croke and Montague, in the case of *Havergill v. Hare*, Cro. Jac. 510. The case as to this point was as follows:—William Parker, being seised in fee of lands, on the 31st October, 8 Jac. 1. by indenture enrolled, granted a rent of 20*l.* *per annum* to Isaac Warden, payable at Michaelmas and the Annunciation, with clause of distress; and by the same indenture covenanted to levy a fine of the same lands to the uses following, *viz.* that if it should happen that the said yearly rent of 20*l.* should be in arrear, and no sufficient distress upon the premises, or if any rescous, pound-breach, or replevin, should be made, that then it should be lawful for the said Warden to re-enter and enjoy, till satisfied out of the rents. On the 12th June, 9 Jac. 1. Warden sold and conveyed the rent to William Fisher, the lessor of the plaintiff, with all penalties, forfeitures, &c.

On the 19th October, 11 Jac. 1. the rent due at Michaelmas was in arrear; and was demanded by Fisher, but not paid. In the Trinity Term succeeding a fine was levied to Fisher, to the uses specified in the first indenture of covenant above-mentioned. Fisher afterwards distrained for the half-year's rent of 10*l.* due at Michaelmas, 11 Jac. and the tenant of the land replevied; whereupon Fisher entered under the uses of the fine. And one of the questions in this case was, whether, as this rent of 10*l.* was due and demanded before the fine levied, (at which time no use could arise upon the non-payment) and then after the fine levied a distress was taken for the rent due *before* the fine was levied, and afterwards replevin was sued thereupon, a title of

entry accrued by way of use to William Fisher? and on this point the Justices were divided; for Haughton and Doderidge held, that as the rent was due before the fine levied, the use upon the fine could not be extended to the rent formerly in arrear. But Croke and Montague held, that the fine levied and the first indenture were but *one assurance*; for the execution of all things executory respects the original act, and shall have relation thereto: and all make but one act, although done at several times. See Vin. tit. Dev. (O) pl. 3. Jones 7, pl. 7. Mitton v. Lutwich, and Salk. 341. Lloyd v. Lord Say and Sele; see also S. C. in 3 P. Wms. 170. and the observation in the note to the first edition. It appears, however, from what has been decided and held in Courts both of law and equity in the great case of Goodtitle v. Otway, that where articles are made providing for a reversionary interest in the covenantor, and then the covenantor by will disposes of such reversionary interest, and then makes a settlement whereby his whole legal estate is conveyed to uses correspondent to the articles, the will is not saved by any relation of the settlement to the articles in analogy to the abovementioned cases of assurances by fines and recoveries.

## PART V.

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### CHAP. I.

#### REPUBLICATION OF WILLS.

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##### SECT. I.

#### *The Doctrine of early Decisions.*

**AFTER** the statutes 32 and 34 Hen. 8. the Courts of Justice were frequently divided on the validity of parol republications of wills of lands ; and it appears that, in opposition to the clear sense of those statutes, the favour with which all testamentary dispositions were regarded sometimes gave the effect of a republication to slight and unconsidered expressions. In the case of *Beckford v. Parnecott*, (a) which was determined in the 37th year of Elizabeth, a man seised of lands in A. devised the same to B. and C. and appointed them his executrixes, and then purchased other lands in A. ; and being requested to sell the lands which he had lately purchased, refused so to do, saying, “ No, they shall go with my other lands in A. to my executrixes ;” and afterwards being sick, the will was read to him, without his making any observation : but in a codicil, which he annexed, he gave legacies of goods to other persons on

(a) Cro. EL. 493.

his death. Upon a question being made, whether by these words spoken to a stranger, the will was republished, so as to make the new purchased lands pass; Fenner, Clinch, and Popham, held them to amount to a new publication. (1)

In *Fuller v. Fuller* (2) which took place much about the same time with that of *Beckford v. Parnecott*, where the devise was to the testator's son Richard, and the heirs of his body; which Richard afterwards died in the lifetime of the testator, and the testator said, "My will is, that the sons of Richard, my deceased son, shall have the land devised to their father, as they should have had if their father had lived, and died after me," Popham and Fenner held, that this was a new publication to carry the land to Richard's son; but Gawdy and Clinch were of a contrary opinion.

The point of republication was also frequently in agitation after the statute of 29 Car. 2. c. 3.; and there are early decisions of great laxity on the subject, notwithstanding the provisions of that statute. Thus, in *Cotton v. Cotton*, (b) which was before the Court of Chancery in the year after the passing of the statute of Frauds, A. being seised of several lands in D. made his will, devising his lands in D. and all other his lands and tenements whatsoever, unto his wife, and afterwards purchased *other* lands, and then discoursing with B., B.

(b) *Freem.* 264. 2 Ch. Rep. 138.

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(1) According to the report in *Mod.* 404. Gawdy, J. doubted. *Dyer*, 143 *a.* marg. pl. 55. cites S. C. as adjudged; and says, the main reason given by Fenner was, that the annexing of the codicil amounted to a new publication.

(2) *Cro El.* 423. In *Mod.* 353. where the same case is reported, the reporter adds a query; and says, the reason given for the difference in opinion was, because the last publication was not in writing; but the others thought there was enough before in writing to pass the land to the issues; though there they were to take by descent, but, under the republication, by purchase. The better opinion appears clearly to have been that of Gawdy and Clinch, according to the analogy of all the best cases.

desired him to let him have those newly-purchased lands at the rate at which he bought them; and the testator answered, "No;" for that he had made his will and settled his estate, and he intended that his wife should have his whole estate; the Court inclined strongly to hold this a new publication, and particularly with respect to the lands; and that it was not material that the words should have been expressed *animo testandi*, for that must necessarily be intended when the discourse had particular reference to the will. By the report of the same case in Chancery Reports, it appears that the point of republication was referred by the Court of Chancery to a trial at law, at which a special verdict, by the direction of Lord Chief Justice North, was found; and on a solemn argument before all the Judges of C. B. they unanimously gave judgment for the devisee against the heir at law.

About forty years afterwards it was held by Lord Macclesfield, when he sat as Chief in the King's Bench, that since the statute of Charles, there could not be an implied republication of a will of lands, even by the execution of a codicil referring thereto; but that the will must be re-executed (3). At a trial at bar before his Lordship and the other Judges of the King's Bench, the facts of the case appeared to be these: The Earl of Bath, (c) by his will dated October the 11th, 1684, duly executed, took notice that his lands were settled upon his sons Charles and John, in tail male, and then devised in these words: In case my sons shall have no issue male, then, for the preservation of my name and family, I devise my said lands unto my brother B. G. and the heirs male of his body issuing. B. G. died in the lifetime of the testator, having issue George then Lord Lansdown, by which the devise to B. G. in tail

Whether there can be any implied republication of a will since the statute of Frauds

(c) *Panphrase v. Lord Lansdown*, Vin. Abr. tit. Dev. (Z) 22.

(3) That a will may be republished by the testator's repeating upon it the ceremonies required by the statute, vid. *Herbert v. Turbal*, 1 Sid. 162. 1 Keb. 589.

male.lapsed. On the 15th of August, 1701, the testator sent for seven persons, and said, "I sent for you to be witnesses to my will," sometimes varying his phrase, and saying, "to be witnesses to the republication of my will;" and then took a codicil, dated 15th August, 1701, in one hand and the will in the other, and said, this is my will whereby I have settled my estate, and I publish this codicil as part thereof; and then signed the codicil (which lay upon the table with the will), in the presence of the witnesses, who subscribed it in his presence.

By the codicil, he devised in these words:—  
 "Whereas I heretofore made my will, dated 11th October, 1684, which I do not intend wholly to revoke, but in regard to the many accidents and alterations in my family and estate, I, by this codicil, which I appoint to be taken as part of my will, devise as follows;" and then devised divers manors, &c. to his son Charles and his heirs, and 100*l. per annum* to his nephew, then Lord Lansdown, for life. He then put the will and codicil together in a sheet of paper, and sealed them up in the presence of the same witnesses: but the will was not unfolded in their presence; nor did any of them write their names as witnesses on or under the will, or on the same paper, but to the codicil only. And by Parker, Ch. J. and by the whole Court; this was held no republication; for, since the statute 29 Car. 2. there shall be *no republication by implication*: but the will must be *re-executed*, otherwise a devise of lands shall not be good.

Sir William Lytton, (d) by his will 23d March, 1700, devised all his lands to his nephew Lytton Strode and his heirs, and directed that he should take the surname of Lytton: and his personal estate he devised to Dame Russell, his sister, and Lytton Strode, and made them his executors. After his will made, Sir William Lytton purchased the equity of redemption from the mortgagors in fee, of premises which were mortgaged to him before

(d) Lytton v. Lady Falkland, Vin. Abr. tit. Dev. (Z.).



he made his will; and on the 13th June, 1704, by a codicil attested by three witnesses, he said, I make this codicil which I will shall be added to and be part of my last will which I have formerly made; and the Lord Chancellor Cowper, assisted by Sir John Trevor, Master of the Rolls, Lord Chief Justice Trevor, and Mr. Justice Tracy, on the 16th June, 1706, decreed that this was not a republication; for, that since the statute of Frauds, there could be no devise of lands by an *implied republication*; for the paper in which a devise of lands is contained ought to be *re-executed* in the presence of three witnesses.

With respect to the first of these two cases, determined by Lord Parker and the Judges of the Court of King's Bench, though the resolution seems to have been grounded upon the rule then adopted, of holding the statute of Frauds to be inconsistent with all implied republications of wills; and which consequently forbade such effect to be given to a codicil which *declared no positive intention to republish the will*; yet, according to the principle of the case of *Brett v. Rigden* (e) above-mentioned, and the rule of construing a republication of a will not to expand or alter the sense of its expressions, or the legal effect of its limitations, but to apply those expressions and limitations to the existing state of the subjects and objects of the dispositions at the date of the republication, it does not seem that any other judgment could have been given, even on the supposition that the will *was* republished; for if a will limits an estate to go by descent, and the person through whom the descent is to be transmitted dies before the testator, the devise clearly lapses; and if such will is republished, no person can take an estate under it in any other way than in that in which the *original* limitation was calculated to give it to him: he cannot take as a *purchaser* what, according to the effect of the limitation, he was designed to take by *descent*.

If an estate be limited to B. and his heirs, and B. die in the testator's lifetime, the devise lapses; and a republication of the will does not give to the heir of B. a claim by purchase.

(e) Plowd. 345. and see Hartop's case, Cro. El. 243.

The same law, where the devise is of an estate to a man and the heirs of his body, succeeded by the words "And for want of such issue."

The principle of this reasoning was recognised in *Simpson v. Hornsby*, (*f*) the question in which case arose upon the will of one T. A. who, having a wife and only two daughters, devised lands in several towns to his wife, for life, for her jointure; and, after the death of his wife, to his daughter Bridget and the heirs male of her body; and for want of such issue, to his daughter Jane for her life, and after her death to her first and other sons, in tail male successively, with several remainders over. Bridget died in her father's lifetime, leaving issue a son, whom the grandfather took into his own house, and expressed much kindness for. Afterwards the grandfather made a codicil, which began thus: "A codicil to be annexed to my will." And thereby he gave some part of a leasehold estate (which by his will was given to his daughter Bridget) to her son, added another trustee for some charities, and duly executed the same. And the Lord Chancellor, after looking into the books, said he found it already settled that Bridget dying in the lifetime of the testator, the heirs male of her body could not take by purchase; for these words, 'heirs male of her body,' were inserted to express the quantity of the estate; though if the thing were *res integra*, he thought it plainly the intention of the testator that Jane should not take till there should be a failure of the issue of Bridget, for this he thought the words *for want of such issue* fully imported.

These cases, therefore, contained circumstances which would have been an answer to the claims set up under the will on the ground of its being republished by the codicil, without opposing the doctrine of an implied republication; for, upon the principle just above discussed, the republication of the will would not have extended the devise to the parties claiming by reason of it in those cases. However, in Lord Lansdown's case, we have observed, that Lord Parker in terms denied the possibility of any *implied* republication of a

(*f*) Prec. Ch. 439.

will of lands since the statute of Frauds ; and in the case above mentioned of *Lytton v. Falkland*, the resolution *could* 'only' be founded upon the supposed effect of the statute, to exclude all implied republications, where real property was in question.

With respect to personalty, the question of republication implied is much assisted by the observations of the Judge, in the case of *Stride v. Cooper*, in Prerogative Court, (g) who observed that he would not venture to lay down decidedly, that no act short of a direct and formal republication would be sufficient to revive a former, and revoke a latter will, both instruments remaining perfect ; but it certainly would require either a second publication, or very unequivocal circumstances.

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## SECT. II.

### *Of the Republication by Codicil.*

ABOUT ten years after Lord Macclesfield, then Lord Chief Justice Parker, had decided the case of *Panphrase v. Lord Lansdown*, in the Court of King's Bench, *Acherly v. Vernon* (a) came before him in the Court of Chancery, when his Lordship held an opinion on this subject, not conformable to that which he is represented to have pronounced on the former occasion. The case was as follows :

J. S. by a will, properly executed, dated the 17th January, 1711, devised to M. his wife 1000*l.* *per annum*, for her life, to issue out of his real estate at H., &c. ; to his sister E. 200*l.* *per annum*, for her life ; and 1000*l.* to L. her daughter for her portion ; and after other legacies, he devised the residue of his real and personal estate to A., B., C., D. and E. and their heirs, executors,

(g) 1 Phill. 336.

(a) Com. 381.

and administrators, on trust to vest the residue of his personal estate in lands of inheritance, and directed that his trustees should stand seised and possessed of his real and personal estate to the uses of his will, during his wife's life; and after her decease, if he should die without issue, to the intent that his freehold and leasehold estates, and the lands to be purchased, should be settled to the use of the defendant G. for 99 years; then to his first and other sons in tail male, &c. J. S. purchased several fee-farm rents, assart rents, and other lands and tenements, and then by a codicil, dated 2d February, 1720, being two days before his death, he recites, that he made a will, dated 1st January, 1711; and then says, "I hereby ratify and confirm the said will, except in the alterations hereafter mentioned. The portion to my niece L., shall be made up 6000*l.* and what I have given to my sister and niece shall be accepted by them in satisfaction of all they may claim out of my real and personal estate, and on condition they release all right, &c. to my executors and trustees in my will named; and thus having provided for my sister and niece, I devise all the lands by me purchased since my will, to my trustees and executors in my will named, to the same uses, and subject to the same trusts to which I have mentioned to devise the manor of H., and the bulk of my estate; and I revoke that part of my will, whereby I appoint A., B., and O., three of my trustees in my will, and I desire K. and N. to be two of my trustees, and devise my said real estate to them accordingly." Lord Chancellor Macclesfield decreed, that the will was confirmed by the codicil; that J. S.'s signing and publishing his codicil, in the presence of three witnesses, was a republication of his will, and both together made but one will; and that by the said will and codicil, his fee-farm rents, assart rents, and lands, contracted to be purchased, and all his real and personal estate, (except the copyhold purchased before his will) did well pass. On appeal to the Lords, the decree was affirmed.

Notwithstanding the codicil in the case last produced *expressly confirmed* the will, yet the decree of the court, and judgment of the Lords, have been considered as standing on the general ground, that every executed codicil refers to and acts upon the will, and must in its nature not only suppose the existence thereof, but must attract it into an union with itself, bringing it down to its own date. And upon the authority of this case it stands, that whatever be the apparent purpose of making the subsequent instrument, and whether the subject of its express disposition be real or personal estate, if it import to be a codicil, and have the signature of the testator, and the attestation of three witnesses, agreeably to the directions of the statute in respect to wills of real property, it will have the effect of republishing the will.

This interpretation of the ground of the decree in *Acherley v. Vernon* seems to be built upon the *general* expressions of Lord Macclesfield, in that case, "that the codicil being executed and attested by three witnesses, was a republication of the will; and that they became one will;" and this seems the safest ground for the doctrine to rest upon; for the words of confirmation in the codicil, in *Acherley v. Vernon*, and those declaring the codicil to be part of the will, were only the expression of the tacit meaning of every codicil, which in its very nature supposes and recognises the existence and operation of the antecedent will.

That this was Lord Hardwicke's understanding of the case of *Acherley v. Vernon* clearly appears from the expressions used by him in *Gibson v. Lord Mountfort*, (b) where his lordship says, that in *Acherley v. Vernon*, it was the opinion of the judges, that the codicil was incorporated with the will, *which made it a republication*: thence deducing this *general* proposition, that every codicil executed according to the statute of

(b) 1 Ves. 492, 3.

Frauds, to whatsoever part of the property it may relate, operates as a republication of the will. It was admitted for the heir; said his Lordship, that though it is a codicil only to a personal estate, yet if there is a general clause of confirmation of the will, that *that* will make the codicil, duly executed, a republication of the will. But, said the same Chancellor, this being admitted, *every* codicil becomes a republication, if it is executed by three witnesses, though it relates only to personal estate; for a codicil is, undoubtedly, a farther part of the last will, whether it be *said so* or not.

In the Attorney-General *v.* Downing (c) the Court seemed to be inclined to a *middle* course between the case of Acherley *v.* Vernon, wherein the mere act of making a codicil, executed according to the statute, was a republication; and those of Panphrase *v.* Lord Landsdown, and Lytton *v.* Lady Falkland, in which all implied republication was excluded; by requiring an intention to republish to be declared or expressed, or otherwise distinctly manifested, by the testator, in order to give to his codicil that effect. And Lord Chancellor Camden held, that the annexation of the codicil to the will was *one of the modes* by which such intention might be declared, and was *therefore* a republication. His Lordship seemed to think, that the *expressions* used in the codicil, in Acherley *v.* Vernon, were the foundation of the decree; for the words, he said, were so blended with, and incorporated into the will, that the one could not stand without the other.

The present doctrine holds every codicil, unless it be confined in expression, a republication of a previous will, if such codicil be executed and attested according to the statute.

But by the settling case of Barnes *v.* Crowe, (d) the case of Acherley *v.* Vernon has been set up as the great authority on this subject, to the full extent of the doctrine ascribed to it by Lord Hardwicke, in Gibson *v.* Mountfort, as above laid before the reader; and the effect of *annexation* was there denied, as being

(c) - Ambler, 571.

(d) 7 Ves. Jun. 486.

only parol evidence of a republication, which Lord Commissioner Eyre said could not be received since the statute of Frauds. "If we disentangle ourselves from the rule," said the Lord Commissioner, "that there shall be *no republication* without *re-execution*, the principle that a codicil, attested by three witnesses, shall be a republication, seems intelligible and clear. The testator's acknowledgment of his former will, considered as his will, at the execution of the codicil, if not directly expressed in that instrument, must be implied from the nature of the instrument itself; because, by the nature of it, it *supposes* a former will, refers to it, and becomes part of it; (1) and being attested by three witnesses, his implied declaration and acknowledgment seem also to be attested by three witnesses. Before the statute of Charles II. it was no part of the essence of the republication that the will should be re-executed; any thing that expressed the testator's intention, that the will should be considered as of a subsequent date, was sufficient. Since the statute, continued the Lord Commissioner, re-execution of the will is not necessary; nothing more is required than a writing according to the provisions of the statute, expressing that intent."

In the late case of *Pigott v. Waller*, (e) Sir William Grant submitted to the authority of *Acherly v. Vernon*, as that case was understood by Lord Hardwicke, in *Gibson v. Mountfort*, and by Lord Commissioner Eyre, in *Barnes v. Crowe*; but not without expressing some

(e) 7 Ves. Jun. 98.

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(1) Whatever number of codicils a man makes, they are all parts of his previous will; in so much that, if a testator, after making his will, makes a codicil or codicils in any way modifying its dispositions, and afterwards by any other testamentary instrument ratifies and confirms his will, he ratifies and confirms it together with the codicils which have been made to it, and subject to whatever changes they have made in it. But if a testator, after making his will, makes another will inconsistent with the first will, and afterwards by a will or codicil, effectual as such, confirms the prior will, the effect of the intermediate will is, as it seems, destroyed. See *Crosbie v. Mac Dowal*, 4 Ves. Jun. 610.



disapprobation of the reasonings on which that authority was supported, and a predilection for the old rule, as it stood upon the cases of *Lytton v. Lady Falkland*, and *Panphrase v. Lord Lansdown*; for, said his Honour, a direct republication or re-execution (2) is an *unequivocal* act, making the will operate precisely as if it were executed upon the day of the republication; but a reference to the will proves only, that the deviser recognises the existence of the will, which the act of making a codicil necessarily implies; not that he means to give it any *new* operation, or to do more by *speaking of it*, than he had already done by *executing it*. Why *his speaking of it* should make the will speak, as it is said, is not very easily discernible, as a question of intention. If he speak of it at all, he must speak of it as existing upon the last day as well as the first:—but can that shew that he means it to exist in any *other* form, or with any *other* effect, than he originally gave it?

But his Honour concluded by saying, that *Barnes v. Crowe* afforded a certain rule; and if he departed from that, it would only be to set every thing loose again; not to get back to, what he thought better, the *old rule*; for then *Acherley v. Vernon* would be in the way. He was therefore disposed, for the convenience of adhering to settled rules and former decisions, to hold the codicil a republication.

If a will has a specific reference to a thing subsisting when it was first published, but subsequently with-

From what has been said it may be collected, that though a codicil properly executed makes the will speak, (as it is expressed) at the date of the codicil, yet the will must have words clearly applicable to the intermediate acquisitions, or it cannot have the effect of passing them. And if it had a specific reference to a thing existing when it was first published, but subsequently withdrawn, the republication of it by a codicil will not make it operate upon another subject, which has come by substitution into the place of the

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(2) A re-execution, with a repetition of the ceremonies required by the statute, is clearly a republication.



thing so withdrawn, though precisely similar in its amount and quality. Thus, where a man, by his marriage settlement, having a power to charge a sum of 2000*l.* upon certain premises, made his will accordingly, disposing of this sum, and afterwards by a subsequent settlement extinguished his former power, and created to himself a new power of charging the same sum on other property, and afterwards made a codicil with three witnesses, making no mention of the power; the Master of the Rolls, Sir William Grant, held clearly that the power itself being gone before the death of the testator, the will had nothing to operate upon, and could not be applied to the new power. It is true, he observed, a codicil has the effect of republishing a will, and makes it speak at the time of the republication. But here the will speaks only of the power given by the marriage settlement, which was as much gone as if it had never existed. It was a *new* power, for a *new* consideration, affecting *different* estates. (*f*)

drawn, the republication of it by a codicil will not make it operate upon another thing, which has come by substitution into the place of the thing so withdrawn, though similar in amount and quantity.

This then appears to be the proper understanding of the doctrine, *viz.* that the codicil, if executed so as to act upon the subject, brings down the will to its own date, and makes it speak as if it were made at that time (3); but that still it is made to speak

(*f*) 7 Ves. Jun. 499. *Holmes v. Coghill.*

(3) There is a difference between the relation which a codicil bears to a will, once completed according to the then existing intention, and that which subsists between the interrupted stages of one entire testamentary act; and upon this distinction will, it seems, depend the question, whether or not the *first act* of the testamentary disposition will require to be executed and attested according to the statute. But whether the subsequent writing, be considered as a republication by way of codicil, or as the conclusion of something already begun, such *subsequent* writing to be effectual to pass land, ought to be executed as the statute directs in the case of a devise of lands.

Difference between a codicil and the sequel of an incipient will.

When a will properly executed to pass freehold estates refers to an unexecuted paper *already in existence*, by an unambiguous description, and expressly adopts its contents among its own disposi-

Difference between a codicil and a paper incorporated by reference.

only *its own sense*; and if it had any particular view to any particular object or purpose, which ceased to exist during the interval between the will and codicil, the codicil will not, from the accidental aptitude of the words to another subject created or acquired since the will, have any operation upon that which was entirely out of the original view of the testator.

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tions, such paper is, with exact propriety, said to be incorporated into, and to be executed by the execution of, the will; for its relation to it is that of the part to the whole: but where a *codicil* is said to be part of, or incorporated into a will, this union must be understood to be the effect of its *first acting upon the will by its own force, and attracting it to itself*. The will must be completed by a previous execution to be so republished; and, when so republished, must be regarded as a new will. And it was upon this principle that in the *Attorney-General v. Heartwell*, Ambl. 451., where a will was made before the statute of Mortmain, bequeathing personalty to be laid out in lands for a charity, and after the statute the will was confirmed by a codicil; the codicil, by making the will a new will, brought the devise within the statute; and the same, accordingly, was declared void by Lord Northington.

Hence we see the necessity for both will and codicil to be executed according to the statute. In the case put of the reference by the will to an existing paper, such paper is mute till it is acted upon by the instrument that incorporates it, and has no testamentary operation before the execution of such instrument; whereas, in the instance of the *codicil, the will is first acted upon thereby*; and, being brought down to the date thereof, speaks again with reference to the state of the property, by virtue of *the execution of the codicil*, with which it becomes incorporated; and thus, by a consequence of reasoning, becomes *re-executed* and *re-published* with the solemnities prescribed by the statute. And this is properly the republication by codicil, the effect and meaning of which is, that the terms and words of the will shall be construed to speak with regard to the property of the testator, and the objects of his dispositions, just as they stand circumstanced at the date of the codicil. In construing such will so republished, it must be considered what the words of the will at the time of the republication imported. Their *sense* cannot be enlarged: but their *operation* may, if time or accident have increased the amount or number of the particulars comprised within the compass of its expressions.

In a late case, (4) circumstanced in some respects like the one last above cited, where a will had been made, and a recovery subsequently suffered, upon which was reserved a power to the testator to declare the uses of the land by his will or codicil, and then the testator made a codicil confirming his will, except where altered by that codicil, but taking no notice of his power, the Court of King's Bench, upon a case for their opinion out of Chancery, held that the power was not executed by the codicil: one of their reasons for which opinion seemed to be, that they could not infer an intention to execute the power from the mere general confirmation of the will by the codicil; though they readily admitted that it was not necessary that any express reference should be contained in a will, to make it a valid execution of a power.

It has also been solemnly decided, that this effect of a codicil upon a will, of making it speak as to the existing property of the testator, may be restrained by the manner in which the *codicil* is expressed. Thus, where the codicil, reciting the devise by the will, revoked the same as to two of the trustees, and then devised the *said* lands, &c., lands purchased between the will and codicil have been adjudged not to pass. (g)

The effect of a codicil as a republication may be restrained by its special terms.

We shall conclude this Section with observing, what indeed is obvious enough upon equitable principles, that

(g) *Bowes v. Bowes*, Bos. et Pull. 500. (House of Lords.)

(4) 10 East, 242. *Lane v. Wilkins*. It must be admitted, however, that the more prevailing and ostensible reason seemed to be, that, as the will declared only the testator's intention not to disturb the existing limitation in tail by suffering a recovery, but to leave the estate to go as it stood limited, this declaration amounted to no devise at all; and when, after having altered his intention, and taken a new estate in the premises by suffering a recovery, reserving to himself a power of appointment by deed, will, or codicil, he executed a codicil expressly confirming his will, such could not be considered as carrying the will farther than its natural and proper effect, which was not a positive devise or disposition, but the declaration of a purposed omission.

where a will containing a general devise of the testator's estate is republished, an estate *contracted for* after such devise will in equity pass in virtue of such republication. (*h*)

A testator by his will devised all his freehold and copyhold manors, &c. and real estate whatsoever, upon certain trusts, and gave to the same trustees a sum of 35,000*l.* to lay out in the purchase of lands, to be settled upon the same trusts. He afterwards contracted for the purchase of several estates; and, by a codicil specifying some of the estates which he had so contracted to purchase, devised them to the same trustees, upon the trusts of his will, and directed that the purchase money should be taken as part of the 35,000*l.* confirming his will in all other respects: and it was held, that the codicil amounted to a republication of his will, so as to pass not only the estates therein specified, but all the estates contracted to be purchased between the dates of the will and codicil. (*i*)

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### SECT. III.

#### *Of the Republication of Wills of personal Estate.*

IF by this view of the cases the doctrine of republication, as to real estate, is made clear to the reader, a few words will be sufficient upon the question of the republication of wills of personal estate.

In respect to this description of property, the doctrine is said not to have been changed by the statute of Frauds; and this appears to have been the opinion of Lord Hardwicke, from the words used by his Lordship in the case of *Abney v. Miller*, (*a*) wherein the act of

(*h*) *Broome v. Monck*, 10 Ves. J. 605.

(*i*) *Hulme v. Heygate*, 1 Meriv. 285.

(*a*) 2 Atk. 599.

republication insisted upon was, that the testator, after renewing his leases, being in search for another paper, and the person who was assisting him having taken up the will by mistake, he said, "This is my will," not meaning thereby to republish but to shew that it was not the paper he wanted. His Lordship observed, that to make it a republication, there must be the *animus republicandi* in the testator; which observation warrants the inference, that he was then of opinion that if the words used *had been declarative of an intention* to republish, they would have been effectual to produce such a consequence. What will be the weight of this indirect authority on the point, when the question comes directly under adjudication, remains to be seen: but, in the mean time, one may be permitted to suggest that there is a difficulty in conceiving why the clauses of the statute, which affect the publishing of wills, should not also reach to the republication of them.

A republication is a new publication; and if a will can be republished by parol so as to make it pass property not affected by its original disposition (1),—what is this but making, partially at least, a nuncupative testament, unaccompanied by the forms prescribed by the statute? We have seen that many of the Judges struggled hard against admitting a parol republication of wills of *lands*, even before the *statute of Frauds*, as being in contravention of *the statute of Wills*; and where the requisites are not observed so as to make good a nuncupative testament, the statute of Frauds has imposed the same necessity for a written declaration of the will in respect to personalty. No subsequent writing can republish a will of land, since the statute of Frauds, unless it be executed so as to be itself capable of passing land according to that statute;—why then should a will of personal estate be capable of being

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(1) This supposes the case of a *specific* bequest; for a general disposition of personal estate would be prospective, and therefore would not raise the question.

republished without the observance of the mode whereby alone a personal will can be rendered effectual? (2)

The destruction of the revoking instrument may operate as an implied republication by setting up the original will.

This branch of the subject may be concluded by observing, that although words are never allowed to have the effect of republishing a will of lands (whatever may be the doctrine in respect to personal testaments); yet, where an express or implied revocation has taken place, it has been held that the will may be set up again by a species of implied republication, founded upon the destruction of the revoking instrument. As where a testator makes two wills, the latter of which is inconsistent with the former, if he afterwards destroy the second will, leaving the first in a perfect state, the original will has been held to be set up again: (b) which doctrine seems to stand upon this principle, that the first will being ambulatory during the testator's life, is in existence without any alteration at the time when its operation is to begin, and that which was to be destructive of its operation is out of the way at the moment when it was to have its destructive effect.

But if a legacy given by a will be adeemed, a codicil ratifying and confirming the will has not the effect of setting up the adeemed legacy. (c)

(b) *Glazier v. Glazier*, 4 Burr. 2512.

(c) *Monck v. Lord Monck*, 1 Ball. and Beatty, 298. And see *Izod v. Hurst*, 2 Freem. 234. *Drinkwater v. Falconer*, 3 Vez. J. 623.

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(2) Words written in a void space left in a will was held by Lord Hardwicke to be a republication. *Carte v. Carte*, Amb. 30. But it is clear that this can only be so in respect to personal estate.

## PART VI.

### OF THE LAW RELATING TO THE OFFICE OF EXECUTOR AND ADMINISTRATOR.

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#### CHAP. I.

##### APPOINTMENT, POWERS, RIGHTS, AND REMEDIES.

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##### SECT. I.

*The capacity for the office.—The manner of appointment thereto.—The refusal and acceptance thereof.—What may be done before probate.*

A PERSON excommunicated, until absolution, (a)—an alien belonging to a country at war with us and residing abroad, or here without the king's licence, (b)—persons who from any cause are without common understanding, or who want the common inlets of knowledge, (c) are incapable of the office of executor or administrator.

Who may, and who may not, be executor.

But an infant may be appointed, (though by 38 Geo. 3. c. 87. § 6. he cannot act until he is twenty-one, and an administrator must be substituted in the mean time,) (d)

(a) 2 Burn's Eccl. L. 222.

(b) 3 Bac. Ab. 6. Wells v. Williams, Ld. Raym. 282. Openheimer v. Levy, Stra. 1082. Brandon v. Nesbett, 6 T. R. 23. Bristow v. Towers, *Ib.* 35.

(c) 3 Bac. Ab. 7.

(d) 2 Bl. Com. 503.

and so may a married woman with the consent of her husband: (e) but if she is under twenty-one, he shall exercise the office. (f)

A foreigner belonging to a country at peace with us, (g) an alien enemy resident here with the king's licence, (h) a Roman Catholic conforming to the requisites of the 31 Geo. 3. c. 32., and a person outlawed or attainted, (i) are capable of being executors.

Appointment.

The appointment of an executor is grounded on the will, and he may be constructively appointed by any words denoting the testator's intention to invest him with the character:

The office may be qualified either as to the *time* of its taking place, its *duration*, or the *subjects* to which it is to extend; and may be committed to several persons, as co-executors, who are then considered in law as an individual; of which several appointments notice will be taken under their proper heads.

Of the renunciation.

An executor must, on being cited, appear before the ordinary, or he becomes liable to excommunication for a contempt. He may then renounce the office in express terms, or virtually by refusing to take the customary oath; or, if he be a Quaker, the affirmation: (k) but neither an act *in pais*, nor a mere verbal declaration, will suffice without further solemnity. His renunciation, whether express or virtual, must be entered and recorded in the spiritual court before the ordinary; (l) nor can it be done after taking the usual oath before the surrogate, for thereby he will have made his election to act; (m) nor after he has once administered. (n) He cannot renounce in part; (o) neither can

(e) 3 Bac. Abr. 9. But see 1 Fonbl. 86.

(f) Off. Ex. 215.

(g) 3 Bac. Abr. 6.

(h) 1 Bac. Abr. 5, 137. Co. Litt. 129 b. Wells v. Williams, 1 Ld. Raym. 282. Salk. 46.

(i) 3 Bac. Abr. 5. Co. Litt. 128.

(k) Ld. Raym. 363.

(l) Rolls Abr. 907.

(m) 11 Vin. Abr. 207.

(n) 4 Burn. Eccl. L. 198.

(o) 11 Vin. Abr. 139. 1 Salk. 297.



he assign the office to another: but, in case of his renunciation, administration with the will annexed will be granted to another.

If he renounce in person, he must take an oath that he has not intermeddled with the effects of the deceased, and will not intermeddle therewith with a view of defrauding the creditors. But he may renounce by proxy.

After administration granted he cannot assume the execution during the life of the administrator: (*p*) but after his death he may retract his renunciation, however formally made. And if administration be granted merely in consequence of his non-appearance, he has a right at any future time to come in and prove the will. (*q*)

The acts which amount to an administration are all such as in law belong to the office of an executor, and which are done in that character; so that if there be two executors, and one of them has a specific legacy bequeathed to him, and he takes possession of it without the consent of his co-executor, such an act amounts to an administration. (*r*)

What acts  
amount to an  
administration.

If there be several executors, they must all duly renounce before administration with the will annexed can be granted: (*s*) but if some only renounce, and the rest prove the will, those who renounced may come in at any future time and administer; and if they never acted during the lives, they may assume the execution of the will after the deaths of their co-executors, and shall be preferred to any of *their* executors. (*t*)

The executor of an executor is to all intents and purposes the executor of the first testator, (*u*) and may be so named in legal proceedings, and so on through any number of successive executorships: but if there be two or more original executors, the interest goes

Derivative ex-  
ecutor.

(*p*) 3 Bac. Ab. 42, 43.

(*r*) 11 Vin. Abr. 206.

(*t*) 11 Vin. Abr. 88.

(*q*) Com. Dig. Admon. (B. 4.)

(*s*) Roll. Abr. 907.

(*u*) 2 Bl. Comm. 506. Plowd. 525.

only to the executor of the last survivor ; and if he renounce, the original executorship will not go to his executor, but administration will be granted. (*y*)

If the executor of an executor intermeddle with the administration of the effects of the first testator, he cannot refuse the administration of the effects of the latter, but he may take upon himself the latter, and refuse the former. (*z*)

The authority of executor is from the will, and is vested on the death of testator.

The authority of an executor being derived from the will must be considered as completely vested at the instant of the testator's death. He may, therefore, before proving the will, fully possess himself of his testator's effects, and for that purpose may peaceably enter the house of the heir; he may pay debts owing from, and receive or release debts owing to the estate. (*a*) He may also commence actions, though he cannot declare before probate; since, in order to maintain his claim in a court of law, he must make a profert of the letters testamentary; which when produced, shall be considered as relating back to the time of suing out the writ. (*b*) He may also arrest a debtor to the estate, and shall be justified in that act by this relation of the probate. (*c*) But such relation shall not prejudice a third person; and therefore when the debtor, after being arrested by the executor before probate, paid a debt to another creditor, and continued two months in prison, he was adjudged not to be a bankrupt from the time of the arrest so as to invalidate that payment. (*d*)

Relation of the probate.

The executor may also before probate exert all his official power of disposition over the goods and chattels of his testator; enter upon his leaseholds, (*e*) and pay the legacies bequeathed by the will. (*f*)

He may also before probate maintain actions on his own actual or constructive possession, as trespass, de-

(*y*) 2 Bl. Com. 506. Plowd. 525.

(*z*) 1 Leon. 275.

(*a*) Off. of Ex. 54.

(*b*) 11 Vin. Abr. 203, 204.

(*c*) 11 Vin. Abr. 203, 204.

(*d*) 11 Vin. Abr. 204.

(*e*) *Ib.*

(*f*) *Ib.*

tinue, replevin and trover for goods or cattle of the testator taken or converted after the testator's death. (g)

And in all cases where he need not describe himself in the declaration as executor, and therefore need make no profert of the letters testamentary, as where the cause of action vested originally in himself, he may declare or avow without probate. (h)

Again, supposing him to have intermeddled, he may be sued at law by the creditors of the testator; as the law will not suffer him by his delay to impede the rights of those, to whom by his interference he has made himself responsible. (i)

If he die before probate, though after making his will, and appointing executors, he is considered in law as intestate as to the executorship of his own testator. (k)

Where he dies before probate.

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## SECT. II.

### *Of the Probate, Bona notabilia, and in general of evidence of wills in all courts.*

THE proof of wills in the ecclesiastical court may be, as we have already shewn, either in the common or in the solemn form. For the first method of proof nothing is requisite but that the executor should present the will before the judge, without any citation of the parties interested, deposing that it is the true and last will of the testator, upon which the will passes, and is allowed. But the proof in form of law, or in the solemn form, is, when the will is brought before the judge in

Of the different methods of proving the will.

(g) Roll. Abr. 917.

(h) Nicholas v. Killigrew, Ld. Raym. 436. Smith v. Barrow, 2 T. R. 477.

(i) 11 Vin. Abr. 206, 207.

(k) Plowd. Com. 280 b. 11 Vin. Abr. 205. 2 Vern. 49.

the presence of the parties interested, who are cited to attend, and is subjected to a full examination before it is finally allowed. And if the will happens to be contested, the proof is required to be more solemn, *i. e. per testes*, and by the examination of witnesses in the presence of the parties interested, as the widow and next of kin. (*a*)

For this solemn proof there must be two witnesses: but it is not necessary that they should have read the will or heard it read; if the testator executed the same in their presence, or declared the writing produced to be his last will and testament. (*b*)

Where the common form only has been pursued, the will is open to be disputed before the ecclesiastical judge at any time within 30 years: but where the more formal method has been adopted, the will cannot be disputed after the time limited for appeals has elapsed. (*c*)

When a will is proved in either of the before-mentioned forms, the original is deposited in the registry of the ordinary or metropolitan; and a copy in parchment is made out under his seal, and delivered to the executor, together with a certificate of its having been proved before him. And these documents together constitute the probate. If the paper propounded to the ecclesiastical Court may have any effect on the estate, or, in other words, if it be at all doubtful, whether some part of the property be not freehold, probate will be granted. The probate may be necessary for the purposes of justice, and no evil can arise from it: but if it be perfectly clear that there is no property to which the probate can be applicable, the Court will refuse to entertain any question respecting the validity of the instrument. (*d*)

In general, probate can only be granted in the Court of the ordinary or metropolitan: but it may be granted by courts baron, if they can found a claim to such pri-

(*a*) 3 Bac. Abr. 40. 4 Burn. Eccl. L. 207.

(*b*) 4 Burn. Eccl. L. 205.

(*c*) 3 Bac. Abr. 40.

(*d*) 1 Phill. Rep. 8.

vilege upon prescription, and have exercised it from time immemorial. (e) So also in some boroughs the probate of the wills of the burgesses may belong to the mayor by custom in respect to lands devisable within such boroughs; though still as to personal property the will must be proved before the ordinary. (f)

In common cases, if at the time of the testator's death his property be all comprised within one diocese, the executor ought to prove his will before the bishop of that diocese, or his surrogate.

**BONA NOTABILIA** are goods to the amount of 5*l.* except where the amount is varied by particular custom, as in London, where they must amount to 10*l.* (g) and debts owing to the testator are *bona notabilia* as well as goods in possession. (h) If there be *bona notabilia* of the testator in two distinct dioceses, or in several peculiars within the same province, the will must be proved before the metropolitan. (i) If there be *bona notabilia* in several provinces, probate will belong to the archbishop in each province in respect to the *bona notabilia* lying within his own province: (k) but if they lie partly in different dioceses of one province, and partly in one diocese only of the other; with respect to the former, the archbishop shall have the probate; with respect to the latter the particular bishop. (l) If a man die possessed of goods in London and Dublin, it seems that the grant of administration to the goods in London belongs to the archbishop of Canterbury, and of the goods in Dublin to the archbishop of Dublin. (m) If the death happen in one diocese, and all the effects are in another diocese, provided they amount to 5*l.* the archbishop shall have the probate. (n) The goods which a man has with him, while on a journey, do not consti-

(e) Salk. 41. Cowp. 286.

(f) 3 Bac. Abr. 40.

(g) 3 Bac. Abr. 37.

(h) 1 Roll. Abr. 909.

(i) 2 Bl. Com. 509. 4 Burn's Eccl. Law, 234.

(k) 3 Bac. Abr. 36. 1 Salk. 39. 11 Vin. Abr. 76.

(l) Off. Ex. 48.

(m) Gibs. 472.

(n) 11 Vin. Abr. 80. 4 Burn. Eccl. L. 189.

tute *bona notabilia* in the place where they happen to be. (o)

If the goods are in several peculiars of the same diocese, the metropolitan and not the bishop shall have the probate; (p) and where a testator dies possessed of goods in the diocese of an archbishop, and in a peculiar of the same diocese, there must be separate probates for them respectively. (q)

Probate always belongs to the archbishop if the party die beyond sea, though he leave goods in one diocese only. (r) And the probate of every bishop's testament, or granting administration of his goods, although he has no goods but within his own diocese, belongs to the archbishop. (s)

If the probate be granted by a bishop or inferior judge when it does not belong to him, it is void: but if it be granted by the metropolitan when it does not belong to him, it is only voidable, and is of force until reversed by sentence. (t)

Whatever may be the amount of the testator's effects in the diocese in which he dies, unless he leaves in another diocese goods to the value of 5*l.*, they will not be *bona notabilia*, (u); though if there are goods in two other dioceses amounting to 5*l.* in the whole, they shall be *bona notabilia*, and give the archbishop the probate. (v)

A prerogative probate is always required to obtain an order of the Court of Chancery for payment of money out of Court. (w)

A lease or term for years, if of the value of 5*l.*, is *bona notabilia* where the lands lie; (x) and debts (y)

(o) Off. Ex. 45.

(p) 4 Burn. Eccl. L. 191.

(q) 4 Burn's Ecc. L. 232. 1 Bl. Com. 380.

(r) 3 Bac. Abr. 36. Roll. Abr. 236.

(s) 4 Inst. 335.

(t) 4 Burn. Eccl. L. 193. 11 Vin. Abr. 75, 80. Gibs. 472.

(u) 3 Bac. Ab. 37. 11 Vin. Abr. 80.

(v) 4 Burn's Ecc. L. 232. 1 Roll. Abr. 908, 909.

(w) Thomas v. Davies, 12 Ves. J. 417.

(x) 3 Bac. Ab. 37.

(y) 3 Bac. Ab. 47.

due to the deceased of that amount, however desperate, are also *bona notabilia* : but if there be a bond in the penalty of 5*l.* for the payment of a less sum, though forfeited, it shall not be considered as *bona notabilia*. (z)

Debts by specialty are *bona notabilia* in that diocese where the securities were, and not where the testator lived, at the time of his death : (a) but debts by simple contract are said to follow the person of the debtor, and are therefore *bona notabilia* in the diocese where the debtor resided at the time of the creditor's death. (b) A judgment obtained in one of the Courts at Westminster is considered as making *bona notabilia* where the record is. But a debt on a bill of exchange follows the person of the debtor. (c)

An executor incurs a penalty (1) if he acts but neglects to take out probate within six months after the death of the testator : nevertheless, if he accepts the office, he is still entitled to the probate ; and upon the Ordinary's refusal may have a writ of *mandamus* to compel him to grant it. (d) But the Bishop may return to the writ the pendency of a suit before him in respect to the will. (e)

Penalty on acting without taking out probate for six months.

(z) Off. Ex. 46. (a) 3 Bac. Ab. 37. Shep. Touchst. 463.

(b) Dyer 305. in not. 11 Vin. Ab. 80.

(c) 3 Salk. 164. Ld. Raym. 854. 11 Vin. Ab. 77, 80.

(d) 4 Burn's Eccl. L. 244. (e) Ld. Raym. 262. Burr. 2295.

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(1) See 55 Geo. 3. c. 184. s. 37. whereby it is enacted, that if any person shall take possession of, and in any manner administer, any part of the personal estate and effects of any person deceased, without obtaining probate of the will or letters of administration of the estate and effects of the deceased, within six calendar months after his or her decease, or within two calendar months after the termination of any suit or dispute respecting the will, or the right to letters of administration, if there shall be any such, which shall not be ended, within four calendar months after the death of the deceased, every person so offending shall forfeit the sum of one hundred pounds, and also a further sum, at and after the rate of ten pounds per centum on the amount of the stamp duty, payable on the probate of the will or letters of administration of the estate and effects of the deceased.



An executor  
cannot have  
probate till 21.

Before the statute 38 Geo. III. c. 87. an infant of the age of seventeen was capable of taking out probate, and consequently of maintaining an action as executor, though during his minority he must have sued by guardian or prochein amy: but by this statute he cannot have probate till he attains the age of twenty-one, and is by consequence restrained from bringing an action till that period.

Where there  
are several ex-  
ecutors, pro-  
bate may be  
granted to one  
with a reserva-  
tion for the  
rest.

Where there are several executors, one may take out probate with a reservation for the rest, who may afterwards apply for the probate, which will be granted to the person applying, annexed to an engrossment of the original will: (g) but if they all apply together, one probate is sufficient. (h) A probate may be commensurate with the will, and limited to the specific effects to which the will extends; and an administration may be granted with respect to the rest of his property.

Where there is  
both real and  
personal pro-  
perty, probate  
must be of the  
entire will.

No probate ought to be granted of wills concerning lands only: but where there is both real and personal property, there must be an entire probate. (i) On which subject the law was distinctly laid down by Berkeley, J. in the case of *Netter v. Percival Brett*, (k) who there said, that “ he would insist upon two rules, first, that the probate of testaments for personal things appertains only and properly to the spiritual court; and for the probate of such testaments no prohibition lies. Secondly, that the probate of testaments concerning lands only, and no goods contained therein, ought not to be proved in the spiritual court by compulsion, although they *may* be proved there: and if there be a suit to compel any to prove such testaments in the spiritual court, a prohibition lies. And when a will concerns lands and goods, and is one entire will, it must be proved entirely in the spiritual court. And

(g) 4 Burn's Eccl. L. 244.

(h) 3 Bac. Ab. 30.

(i) 11 Vin. Ab. 57, 60, 117. 2 Salk. 552. 3 Salk. 22.

(k) Cro. Car. 395. and see the contrary determination in Cro. Jac. 346. denied by Lord Holt in *Hudson v. Fisher*, Cas. temp. Holt, 180.



the probate of the will for the land will not prejudice the heir, for it shall not be evidence at the common law; nor shall the examinations of the witnesses there examined be given in evidence at the common law.”

If a will containing personal bequests comprise also a disposition of land to the value of 100,000*l.*, the ecclesiastical court may cite the parties to bring in the original to be proved *per testes*, and the Court of King's Bench ought not to prohibit them. (*l*)

Where the absence of a testator has been so long as to ground a reasonable presumption of his death, the executor is permitted to prove, on swearing that he believes him to be dead. (*m*) And where it happens that the executor cannot be found, temporary administration may be granted. (*n*)

If a will be made in a foreign country disposing of goods in England, it must be proved here: (*o*) but if the effects were all abroad, and the will be proved according to the custom of the country where the testator died, it is sufficient; and the executor may plead such matter to a bill filed against him by the administrator for an account of the personal estate of the deceased. (*p*)

In order to prevent probate, a caveat must be entered in the ecclesiastical court, which will be effective during three months.

The spiritual Court will revoke (2) the probate of a will, if it can be proved that it has been fraudulently obtained, or that the will itself had been revoked: (*q*) but before probate is revoked, the Court will not grant a new one. (*r*) When properly granted, it authenticates

The probate is conclusive evidence as to the will itself. But the legal existence of the probate itself may be controverted.

(*l*) Skfan. 174.

(*m*) Swinb. part 6. J. B.

(*n*) Roll. Abr. 907.

(*o*) 11 Vin. Abr. 58, 59.

(*p*) 11 Vin. Abr. 59, 69. 1 Vern. 397.

(*q*) Off. Ex. 48.

(*r*) 7 Mod. 146.

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(2) Where the issue is whether a will made of lands and goods is revoked, it is properly triable at common law: but if the question be whether a will of goods only be revoked, it is properly triable in the spiritual Court. See Denn's case, Cro. Car. 114.

the right of the executor, and relates to the time of the testator's death. (s) And as long as it remains unrevoked, it cannot be contradicted, but must be received as conclusive in the temporal Courts. (t) Thus against the seal of the ordinary no evidence will be admitted to prove the will forged or fraudulently obtained, or the testator *non compos*, or that another person was executor, which points belong exclusively to the ecclesiastical jurisdiction : but that the *seal itself* was forged, or that there were *bona notabilia*, may be shewn by evidence ; as by such evidence the authenticating effect of the seal is not disputed, supposing it to have been duly obtained, but the legal existence of the probate itself is controverted. (u) The probate is properly to be considered as in the nature of a *sentence* of the ecclesiastical Court, and this is the true reason of its being held conclusive as to the will of the executor. (x) And it is conclusive in Courts of equity as well as in Courts of law. Even a foreign probate where the testator died abroad, and his personal estate was wholly in the foreign country, may be pleaded to a bill claiming on the ground of intestacy, (y) as we have already stated.

Questions affecting the validity of wills

Of wills of land the validity is entirely a matter for the cognizance of the ordinary courts of law (3). But

(s) 11 Vin. Abr. 205.

(t) 1 Ld. Raym. 262.

(u) Strange 671.

(x) *Allen v. Dundas*, 3 T. R. 125. 12 Ves. Jun. 298, 307. 1 Vern. 397.

(y) 1 Vern. 397.

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(3) It has long been settled, that a court of equity will not set a will aside, upon a suggestion of fraud in obtaining it. In *Bennet v. Vade and Others*, 2 Atk. 324. this was said to have been settled ever since the case of *Powis v. Andrews*, 3 Bro. P. C. 476. on the ground that a will of personal estate may be set aside in the Ecclesiastical Court, and of real estate in a court of law for fraud. If the testator be imposed upon in making his will, then it is not his will ; and that is a question of fact, and proper to be tried upon an issue of *devisavit vel non* in a court of common law, if the will relates to real estate. And see the difference between a will and a deed in this respect, *James v. Greaves*, 2 P. Wms. 270.

where a particular clause, and not the whole of a will, has been impeached on the ground of fraud; or if the fraud has consisted in obtaining the consent of the next of kin to the probate, courts of equity have laid hold of these circumstances to declare an executor a trustee for the person injured by fraud. (z)

are properly of legal cognizance.

But although equity refuses to interfere in a direct manner to set wills aside for fraud in making or obtaining them, it will take from a person all benefit under a will to which he has fraudulently entitled himself, and will compel the performance of all promises and assurances upon the faith of which any such benefit has been procured. For the sake therefore of baffling all such base projects, courts of equity will lay hold on the conscience of the deluder, and make him a trustee for the party injured by the breach of confidence: which is a method of relief peculiar to these courts, and by which the legal effect of instruments is saved from disturbance, and private justice is done without breaking in upon the rules or the province of the common or ecclesiastical law. So, if by false representations or assurances a person intending to make a will, or to insert a particular bequest or provision, is induced to leave such intention unexecuted, equity will bind the conscience of the imposing party, and through the medium of a trust compel a specific performance. Thus in *Chamberlain's case*, (a) where an eldest son, his father being about to make his will, and thereby to make certain provisions for his younger children, persuaded him not to make any such will, for that he would take care his brothers and sisters should have such provisions, they were decreed in Chancery to be made good by the heir.

Of the peculiar relief which equity affords.

A man having made his will, and his son executor, said to his son when he was dying, that he had a mind to leave his wife executrix, upon which the son used the following words, "Dont trouble yourself to alter the will, for I will let her have the surplus and act as execu-

(z) *Strange 666.*

(a) *Prec. in Ch. 4.*

trix," the court of Chancery obliged the son to make his promise good. (s) It is proper, however, to apprize the Reader, that he will meet with many cases in which the equitable relief in matters of fraud has been carried to the extent of setting wills aside for fraud in a direct manner. (a) But since these cases we have Lord Hardwicke's clear and decisive opinion that the law is settled as is above stated. (4)

Payment to an executor who has obtained probate of a forged will, discharges the debtor.

Since a probate is conclusive until it is repealed, and a court of common law cannot receive evidence to impeach it, it has been determined that payment of money to an executor who has obtained probate of a forged will, is a discharge to the debtor of the deceased, though the probate should be afterwards revoked: (b) but payment of money under probate of a supposed will of a living person is void, because in such case the ecclesiastical court has no jurisdiction, and the probate can have no effect.

It is also holden that, pending a suit in the spiritual court respecting the validity of a will, an indictment for forging it ought not to be tried; and it is the practice to postpone the trial till that court has given sentence. (c)

Probate no evidence of a real estate.

The probate of a will in the spiritual court is no evidence of a devise of real estate. (d) It is no proof of the contents of the will in respect to that description of property, even though the original will is lost. Nor is it receivable as evidence when it is offered not to establish a devise, but for the purpose of proving a pedigree

(z) Gilb. Eq. Rep. 11.

(a) Welby v. Thornough, Prec. in Ch. 123. Herbert v. Lounder, 1 Ch. Ca. 22. Maundy v. Maundy, *id.* 123. Goss v. Tracy, 1 P. Wms. and Farrington v. Knightley, 548.

(b) Allen v. Dundas, 3 T. Rep. 125.

(c) 3 Bac. Abr. 34. 1 Stra. 481, 703. 3 T. R. 126. See also Eq. Ca. 207, 208. Palm. 163.

(d) Bull. N. P. 345.

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(4) Mr. Powell has attempted a distinction by way of reconciling these cases, in which there is more subtilty than precision. Pow. on Dev. 696.

or relationship only. (e) Thus, says Mr. J. Buller, (f) where a person would prove the relation of a father and son by his father's will, he must have the original will, and not the probate only; for where the original is in being, the copy is no evidence; besides the seal of the court does not prove it a true copy, unless the suit only related to personal estate. But the ledger book, continues the same authority, is evidence in such a case, because this is not considered merely as a copy, but is a roll of the court; and though the law does not allow these rolls to prove a devise of lands, yet when the will is only to prove a relation, the rolls of the spiritual court, which has authority to enrol all wills, are sufficient proof of such testament. And under particular circumstances, the ledger book has been allowed as evidence even of a devise of real estate; as where, in an avowry for a rent-charge, the avowant could not produce the will under which he claimed, as it belonged to the devisee of the land, but produced the ordinary's register of the will, and proved former payments, it was holden to be sufficient evidence against the plaintiff, who was devisee of the land charged.

A copy of the ledger book is said not to be evidence; yet, since the original would be read as a roll of the court without further attestation, it seems fit the copy should be read. The contrary practice has been founded upon the mistake, that the ledger book is read as a copy, so that the copy of that is but the copy of a copy; whereas the ledger book is read as the roll of the court.

The ledger book, or a copy, seems to be evidence as to personal estate.

But the law will not allow these rolls or registers to prove a devise of land, when the claim is by the operation of the will itself, for to that purpose the ecclesiastical courts have no power to authenticate wills. Neither will an exemplification under the great seal be evidence of a will in a trial at law. (g) But where the will can be had, the will itself must be produced to sub-

But not as to land.

(e) 1 Lord Raym. 732. Doe dem. Ash v. Calvert, 2 Campb. 389.

(f) N. P. 246.

(g) Comb. 46.

stantiate a title to lands under it. And where, in evidence to a jury at bar in ejectment, the defendant made title as a purchaser under a devisee, and shewed only a bill in Chancery preferred by the heir, under whom the lessor of the plaintiff claimed, against the devisee, wherein the will was set forth, and also the answer in which it was confessed; it was held by Keeling and Moreton, Justices, (*Twysden contra*) that this was no evidence, though they proved possession according to the devise, and that this had been confessed by the plaintiff in former trials; because the will itself was the best evidence of its own existence.

But where the original will can be proved to be lost, the probate even of a will of lands may be evidence.

But where the original will was proved to have been lost, the probate even of a will of lands was considered by Lord Holt as good evidence. (*h*) Thus where it appeared upon evidence in ejectment, that a will was made of the lands in question in 1647, which will was lost, but mention was made of it in the calendar (which is the index of the register in the spiritual court,) and also in the seal book, and that a commission issued in April 1748 to examine the executors upon oath, &c. which being returned, probate had been granted in May 1648, and the probate was produced in evidence, Holt, C. J. allowed it at the assizes to be good proof of the will, but reserved it for further consideration. Afterwards, however, as well in the King's Bench as at Nisi Prius upon other trials, he declared himself to hold to his first opinion.

It seems that where a will remains in Chancery by order of the court, or wherever a will is lodged in a court that has jurisdiction over the subject-matter of it, the copy becomes evidence, upon the principle that the will has thereby become a roll of the court, and might itself be read without further attestation, and so by consequence a copy of it ought to be permitted to be read. (*i*)

The copy of the probate (but not a copy of the

(*h*) *St. Leger v. Adams*, 1 Lord Raym. 731.

(*i*) *Gilb. Law of Ev.* 74.

original will) (*k*) is unquestionable evidence where the will is of chattels, or as far as it regards chattels only; for to this purpose the probate is an original document taken by authority, and of a public nature. (*l*)

Where the probate is lost, the spiritual court does not grant a second probate, but gives out an exemplification of it from the record of the court, and such exemplification will be evidence that the will was proved. (*m*)

Where the probate is lost, an exemplification is given out.

To prove the fact of the revocation of a probate, an entry of the revocation in a book of the Prerogative Court, in which all causes are entered by the register, and which is kept as the only record of such proceedings, and of the decree of the court, has been admitted as sufficient evidence. (*n*)

Of the revocation of the probate.

In case of a revocation of probate all the intermediate acts of an executor<sup>o</sup> are void, and this revocation may be procured either by suit or appeal in the ecclesiastical court: but equity has allowed payments either of debts or legacies made by an executor under a revoked will without notice of the revocation. (*o*)

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### SECTION III.

#### *Of the Letters or Grant of Administration.*

WHEN a person dies without a will, he is said to die intestate, in which case the stat. 31 Edward III. c. II. provides that the ordinary shall depute the nearest and most lawful friends of the deceased to administer his goods; and they are thereby put on the same footing in regard to suits, and to accounting, as executors appointed by the will.

(*k*) Bull. N. P. 246.

(*l*) 3 Salk. 154.

(*m*) *Shepherd v. Shorthouse*, 1 Strange 412.

(*n*) *Ramsbottom's case*, 1 Leach, Cr. Ca. 30. note (*c*).

(*o*) 3 Bac. Abr. 50. 1 Cha. Ca. 126.



The stat. 21 Hen. VIII. c. 5. empowers the ordinary to grant administration either to the widow or next of kin, or to both of them, at his discretion, and to elect whom he pleases of two or more persons in the same degree of kindred.

Of the husband's right to administration.

Whether the Courts of law in the interpretation of the word 'friends,' in the statute of Edward, have given the first place to the husband, or, as some contend, the common law has given him this right, is not now a question of much importance, as his exercise of the right is undisputed. (1) This right, however, may be controlled by circumstances ; (a) as where a husband parts with all his interest in his wife's fortune. But when a feme covert has power to dispose by will of a part of her property, and appoints an executor for that purpose, letters of administration will be granted to the husband for the rest. (b)

Where, by virtue of her power to dispose of her estate, a feme covert devised a term for years to I. S., administration was granted to the devisee. (c)

Wife and next of kin.

The ordinary is to grant administration of the effects of the husband to the widow or next of kin: but he may grant it to either or both at his discretion. (d)

If the widow renounce administration, it shall be to the children, or other next of kin of the intestate, in preference to creditors. The ordinary may also grant administration of part to the wife and of part to the next of kin. (e)

(a) 3 Bac. Abr. 55. in not. Com. Dig. Admor. B. 6.

(b) 4 Burn. Ecc. L. 232. Rex v. Bettesworth, Stra. 891, 1111.

(c) Marshall v. Frank, Prec. in Ch. 480.

(d) 11 Vin. Abr. 92. Str. 552.

(e) 11 Vin. Abr. 71. 3 Bac. Abr. 55. 1 Salk. 38.

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(1) The stat. 29 Car. 2. c. 3. recognises this right, and provides against its being affected by the stat. of Distributions, 22 and 23 Car. 2. c. 10. And where a marriage takes place within the prohibited degrees, if such marriage be not declared void in the lifetime of the parties, the surviving husband will be entitled to administer to the effects of the wife deceased, Elliot v. Gurr, 2 Phill. Rep. 16.



Consanguinity (*f*) or kindred is the connexion of persons who are descended from the same common ancestor, and may be either lineal or collateral. Lineal consanguinity is that which subsists between persons, one of whom is descended from the other in a direct line, as between a man and his father, grandfather, &c. ascending, and his son, grandson, &c. descending. Every generation, in this kind of consanguinity, constitutes a different degree. Thus a man is related to his father and his sons in the first degree, to his grandfather and grandson in the second degree, and so on.

Of the degrees of kindred.

Collateral relationship agrees with lineal, in that the parties are descended from the same common ancestor; but differs, inasmuch as they are not descended one from the other: thus, brothers, cousins, uncles, and nephews, are collaterally related.

The mode of calculating the degrees of relationship in the collateral line, conformably to the method of the civil law, is by counting upwards from one of the parties to the common ancestor, and from the common ancestor down again to the other party, reckoning one degree for each person in the ascending or descending process. (*g*)

Of these kindred those are to be preferred who are most nearly related. Of the next of kin, first the children, or if there be none of them, the father, or, if he be dead, the mother, is entitled to administration. Then follow in order, brothers whether of the whole or half blood, and without any difference in respect of seniority; grandfathers, uncles or nephews; and in the last place cousins, and the females of each class in the same order. (*h*)

Relations by the father's and mother's side are equally entitled, provided they are in equal degrees of kindred.

A married woman who is entitled, cannot obtain administration without the permission of her husband, because he must enter into the administration bond,

(*f*) 2 Bl. Com. 202.

(*g*) 2 Bl. Com. 207.

(*h*) 1 Vin. Ab. 91. 2 Bl. Com. 505. and see *Warwick v. Grville*, 1 Phill. Rep. 123.

unless it can be shewn by affidavit that he is abroad, or otherwise incompetent, in which case a stranger may join in the security ; but in either case the administration is granted to her alone. (*i*)

Where a married woman, a minor, is next of kin.

If a married woman who is not of age be the next of kin, she may choose her husband to be her guardian to take the administration for her use and benefit during her minority ; and on her coming of age a new administration may be granted to her. (*k*)

There are certain legal disqualifications which may prevent a person from being an administrator, besides those which would disable him from acting as an executor ; as attainder of treason or felony, outlawry, imprisonment, absence beyond sea, and even bankruptcy. (*l*) An alien, who may be an executor, may be an administrator. (*m*)

No person can properly act as an administrator until letters of administration are granted to him : and if he omits taking out letters of administration within six months from the time he administers, he incurs the penalty of the statute 55 Geo. III. c. 184, above referred to.

Letters of administration, unless in particular cases (as where the effects left are of a perishable nature, in which case the judge may decree them sooner,) do not issue until fourteen days after the decease of the intestate. (*n*) when lawfully required. He must also pursuant to the

What a person must do in taking out letters.

When a person applies for letters of administration, he must swear that as far as he knows and believes the deceased made no will, and that he will truly administer the goods, chattels, and credits, by paying the deceased's debts as far as the property will extend, and that he will make a true and perfect inventory of all the goods, chattels, and credits, and exhibit the same into the registry of the spiritual court at the time assigned him by that court, and render a just account of his administration

(*i*) 11 Vin. Abr. 85. 4 Burn's Eccl. L. 241.

(*k*) Blackborough v. Davis, 1 P. Wms. 53.

(*l*) 4 Burn. Eccl. L. 233. 3 Bac. Ab. 56. n.

(*m*) 9 Co. 39 b. 11 Vin. Ab. 94. 4 Burn's Eccl. L. 233.

(*n*) 4 Burn's E. c. L. 242.

21 Hen. VIII. c. 5. and 22 and 23 Car. II. c. 10. enter into a bond with two or more sureties conditioned for the performance of those duties.

An administration once committed to one of the next of kin excludes others, though equally related to the deceased, the maxim being “qui prior est tempore potior est jure.” (n) And among persons in equal degree, applying for administration, the ordinary has the power of making his election: (o) which election has sometimes been determined by reference to the difference of character and responsibility; (p) and sometimes between persons equally related, the preference has been given to him who has been recommended to the appointment by the majority of interests in the estate of the deceased. (q)

#### SECT. IV.

*Of particular and supplementary Administrations, and such as are granted on the death of an Executor intestate, or of an Administrator.*

IF no executor be named in a will, (a) or one be named who dies in the life-time of the testator, or if he be incompetent to execute the office, or refuse to act, administration with the will annexed must be granted; though, if he subsequently become competent, such administration is no longer of force.

Of administration with the will annexed.

But in such cases administration will generally be granted to the residuary legatee if there be any, (even if it is uncertain whether there will be a residue,) rather than to the next of kin. (b)

If the executor be a minor, administration must be granted until he comes of age (which by stat. 38 Geo. III. c. 87. is not until he is 21 years old); and if there

Of administration during the infancy of the executor, or executors.

(n) 11 Vin. Ab. 116. 1 Vent. 218.

(o) 11 Vin. Ab. 114, 115.

(p) Bell v. Timiswood, 2 Phill. Rep. 22.

(q) Budd v. Silver, 2 Phill. Rep. 115.

(a) 11 Vin. Ab. 69. 2 Bl. Com. 503.

(b) 11 Vin. Ab. 90, 94.

be several executors, and all under age, he who first attains the age of 21 years may prove the will, and the administration will cease. (c) But the administration does not cease on the marriage of an infant executrix with a husband of full age. If one of the executors be of age, and the other a minor, he who is of age has the execution of the will. (d)

There is also another administration of this temporary kind which is granted during the absence of the executor, or next of kin; which lasts only till the executor or next of kin respectively appear, and qualify themselves. (e)

During the pendency of a suit.

Another sort of administration is that which is granted while a suit is depending, either with respect to the will or the administration, which is called an administration "*pendente lite*."

When all the next of kin refuse.

When the next of kin cannot receive any benefit from the estate, and refuse the grant, the course is for the ordinary to issue a citation for the next of kin in special, and all others in general, to accept or refuse letters of administration, or shew cause why the same should not be granted to a creditor; (f) and if several creditors apply for administration, though the court may prefer one of them; yet, upon petition of the rest, it will compel him to enter into articles to pay debts of equal degree in equal proportions, without any preference of his own.

Administration by a creditor.

Where administration will be granted to the attorney of the parties entitled.

The ecclesiastical court will grant administration to the attorney of the executor, or of all the executors, or of all the next of kin, if they do not reside within the province; and if the effects are under 20*l.*, such administration will be granted, whether they are resident or not within the province. But an administration granted by a foreign court will not be taken notice of in an English court of justice, in respect to property situated here. Therefore, if a will be made in a foreign country, dis-

(c) 4 Burn's Ecc. L. 240.

(d) 4 Burn's Ecc. L. 240. 11 Vin. Ab. 99. 1 Mod. 47.

(e) Roll. Ab. 907. (f) 4 Burn's Ecc. L. 230. 2 Bl. Com. 505.

posing of goods in England, such will must be proved here. (g) But it is otherwise if the effects are ad abroad, and the will is proved according to the custom of the country where they happen to be.

By 38 Geo. III. c. 87. after the expiration of twelve months from the testator's death, if the executor, to whom probate has been granted, is residing out of the jurisdiction of his Majesty's courts, on application of any creditor next of kin, or legatee, grounded on affidavits in the form therein specified, stating the nature of the demand, and the absence of the executor, administration shall be granted.

Where the executor resides out of the jurisdiction of the king's courts.

A special administration may be taken out, limited to a particular chattel. And this is sometimes of great importance to be done for the sake of obtaining an assignment of a term of years, to protect the inheritance of a purchased estate.

Of a limited administration.

If an administrator be outlawed or imprisoned beyond sea, administration may be committed to another; but only while the incapacity lasts.

If a person who has no kindred, or a bastard who can have none legally, dies intestate, the king as *ultimus hæres*, is entitled to his property: (h) but in such case it is the practice to transfer the royal claim from the crown to the nearest connexion of the party, to whom the ordinary of course grants letters of administration, with a reservation, as it is said, of a tenth or other small proportion of the property.

Where a bastard dies intestate.

When there are two administrators, and one of them dies, the survivor is sole administrator. (i) If a sole administrator die, a new one must be appointed by the ordinary.

If a person dies intestate, leaving a father or other person who will be entitled to the administration entirely for their own sakes, being solely interested in the property, and not for the purpose of distributing the effects to others equally entitled, and such father or

Where the person entitled to administer for his own sole benefit dies before taking out administration.

(g) 11 Vin. Abr. 58.

(h) 3 P. Wms. 33. 1 Woodes. 308.

(i) Ca. temp. Talb. 127. 4 Burn's Ecc. L. 241.

other person die before taking out letters of administration, his representative, and not the representative of the deceased, will be entitled to the administration. (*k*) But in the case of a husband it has been settled that the court is bound by the statute 31 Ed. III. c. 11. to grant administration to the next of kin of the wife who shall be a trustee in equity for the husband's representatives. (*l*)

Of the administration *de bonis non*.

Where an executor or administrator after probate or letters of administration dies, without having fully administered, a fresh administration is granted of the goods unadministered, called an administration *de bonis non*. (*m*) And this is usually granted to the residuary legatee, in preference to the nearest of kin, because the next of kin has in such case no interest in the property. (*n*)

Where a feme covert executrix and residuary legatee dies intestate.

If a feme covert be executrix, and also residuary legatee, and die intestate, the husband will be entitled to administer to the testator. (*o*)

If a feme covert die having debts owing to her, contracted before marriage, which by law do not belong to her husband, administration will nevertheless be granted to her husband; and, if granted to her next of kin, it will be repealed. (*p*)

Where a surviving executor renounces.

If a surviving executor renounces, administration is granted to the next of kin of the testator, and not to the representative of the deceased executor, even though he proved the will and acted. (*q*)

If an executor be also residuary legatee and die (whether before or after probate) intestate, administration, with the will of the first testator annexed, shall be granted to the administrator of such executor; or if he

(*k*) 11 Vin. Ab. 88. 1 P. Wms. 381.

(*l*) 3 Atk. 526. 4 Burn's Ecc. L. 235. 1 Ves. 16. 1 Wils. 169.

(*m*) 11 Vin. Ab. 111.

(*n*) 3 Bac. Abr. 19. Thomas v. Butler, 1 Ventr. 219. 11 Vin. Ab. 87. Farrington v. Knightley, Prec. in Ch. 567.

(*o*) 11 Vin. Ab. 89, 91.

(*p*) 11 Vin. Ab. 92.

(*q*) 11 Vin. Ab. 90, 108.

made a will, his executor will be entitled to such administration. (r)

In cases where administration has been improperly granted, it is sometimes *void*, and sometimes only *voidable*. It is void if granted in derogation of the right of an executor; as where one has been named, and the will has been suppressed, or its existence unknown; (s) or before the refusal of the executor, or a fresh refusal of a surviving executor who refused in the life-time of his co-executor, or without competent authority, as where there are *bona notabilia* and it is granted by the bishop of the diocese. (t) But where it is granted in derogation of the right of kindred according to the degrees of affinity, as to one not next of kin, or to one next of kin jointly with one not of kin, or to a creditor before the renunciation of the next of kin, in these cases it is voidable only by the act of the Spiritual Court. It is subject also to be repealed when granted to the next of kin instead of the residuary legatee; and that even though there be no actual residue; (u) or if granted to the next of kin of a feme covert instead of her husband (v) or by the metropolitan, where there are not *bona notabilia*. (w)

Where administration improperly granted is void, and where only voidable.

But there are some cases in which, though an administration may be said to have been granted with some degree of irregularity, (as when among the kindred of the same degree administration is granted to the younger instead of the elder, or the female instead of the male, or to a creditor for a less instead of one for a larger amount), yet it does not seem to be within the competency of the Spiritual Court to revoke or repeal the grant; (x) nor is the abuse of the letters of administration a sufficient ground for repeal, as the ordinary

(r) 11 Vin. Ab. 88, 92.

(s) Plowd. 279.

(t) 3 Bac. Ab. 36. Blackborough v. Davis, 1 Salk. 39.

(u) Vent. 219.

(v) 11 Vin. Ab. 92.

(w) 11 Vin. Ab. 114. Allen v. Andrews. Cro. El. 283.

(x) 11 Vin. Ab. 100, 116.



ought to have taken sufficient caution in the first instance. (y) If after an administration is granted a second be issued, and afterwards the first be repealed, the second shall stand. (z) In all cases the question of fact as to the next of kin is exclusively a matter of spiritual cognizance. (a) And in general, wherever administration has been granted to the wrong party, the grant may be repealed, and administration granted to another; though a person in possession of administration is not bound to propound his interest till the party calling in question the grant has first propounded and proved his. (b)

It is plain that wherever the administration is void, and not merely voidable, the acts done under the administration will be of no validity; for the administration was null *ab initio*. So also where the administration is only voidable if it be reversed upon an appeal, (c) by which reversal it is as if it had never existed. But all lawful acts of such first administration shall stand good; if it be only countermanded or revoked upon suit by citation; and it is always sufficient if a debt is *bona fide* paid to the visible administrator. (d) Debts, funeral expenses, and legacies paid by an administrator, shall be allowed to be deducted in the damages recovered against him on the subsequent appearance of an executor.

And if administration be committed to a creditor, and afterwards revoked upon citation at the suit of the next of kin, such creditor shall retain against the rightful administrator, and before sentence of repeal his disposition of the goods of the intestate will stand good. (e)

(y) 11 Vin. Ab. 115. 1 Vent. 219.

(z) Com. Dig. Admor. (B 3.)

(a) 11 Vin. Ab. 92. 115.

(b) Dabbs v. Chesman, 1 Phill. Rep. 155.

(c) 11 Vin. Ab. 117. Allen v. Dundas, 3 T. R. 129.

(d) Allen v. Dundas, 3 T. Rep. 125.

(e) Blackborough v. Davis, 1 Salk. 38. P. Wms. 213. Thomas v. Butler, 1 Vent. 219.



And whether the administration be void or voidable, payment to the administrator of debts *bona fide* owing to the estate will discharge the debtor. (f)

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SECT. V.

*Of the power and interest of an Executor or Administrator in respect to the Testator's property.*

All the personal estate of the testator vests in the executor immediately on the testator's death, and in the administrator in virtue of the grant of administration : which grant has relation to the time of the intestate's decease. (a) He has the same power of disposing of the effects as the testator himself had, and the same remedies for recovering and protecting them. But he cannot bequeath them by his will ; nor are they transferred by the marriage of the executrix. His own property only will pass by a general grant ; (b) nor are his testator's effects liable to be taken in execution for his own debts, (c) or to be transferred by the commissioner's assignment in case of his bankruptcy, or to be forfeited by his attainder. (d)

Difference between an executor's own property, and that which is his as executor, in respect to the consequences of his legal acts, and situations.

Chattels real are such as partake of real estate, that is to say, such interests as are issuing out of or annexed to real estates, as terms for years, though determinable on lives, and reversionary interests in such terms, next presentations to churches, estates by elegit, &c. These vest in the executor, and are to be administered by him as the assets of the testator ; and if a lease is renewed

If terms of years, and leases.

(f) *Allen v. Dundas*, 3 T. R. 125. Vin. Ab. 117. Finch Rep. 40.

(a) 3 Bac. Abr. 57. 2 Roll. Abr. 554. Com. Dig. Admor. B. 10, 11.

(b) 2 Roll. Abr. 58. p. 8. *Marlow v. Smith*, 2 P. Wms. 200.

(c) 11 Vin. Abr. 272. *Farr v. Newman*, 4 T. R. 621.

(d) 2 P. Wms. 200.

by an executor, the new lease shall stand in the place of the old one as assets. (e) An executor cannot waive a term of years of which his testator died in possession, though it be of no value, without a total renunciation of the executorship, unless he has not assets sufficient to pay the rent, in which case, on giving notice to the lessor, he may throw up the lease. (f) And a term in the executor is not merged by the accession to him of the inheritance, as to the interests of creditors and legatees. (g)

Estates held for the life of another, if the heirs were not named in the grant, so as to found a title by special occupancy, devolve, upon the death of the grantee, to his executor, by virtue of the 29 Car. 2. c. 3. as assets for the payment of debts; and in case of a surplus after payment thereof, the stat. 14 Geo. 2. c. 20. has directed them to be administered in a course of distribution.

Though all chattel interests vest in the personal representative, yet where such chattels partake of the nature of real property, as leases for years, the law does not regard the executor as being fully possessed of them until he has entered: but where they are of such a nature as not to admit of actual entry, as is the case with all incorporeal hereditaments, the executor has an immediate possession by construction. (h)

Of personal  
things.

Things of a personal nature of course pass to the personal representative, unless in certain excepted cases. Such as are animate, where they are of the tame kind, and likewise such as are naturally wild, provided they have been rendered tame by art, or kept in a confined state, as deer in a park, rabbits in an enclosed warren, fish in a pond, bees in a hive, belong to the executor: but animals, wild by nature, which are not so confined, or escape from their confinement and

(e) 3 Bac. Abr. 58.

(f) *Ld. Raym.* 554. *Hargrave's case*, 5 Rep. 30. *Fooler v. Cook*, 1 Salk. 297. Off. Ex. 120.

(g) 11 Vin. Abr. 236.

(h) 11 Vin. Abr. 240.

regain their natural liberty, are not considered as property, and therefore of course are not transmissible, except where they are in the habit of going loose and returning, or have a mark or collar upon them to denote the property in them.

Many things affixed to or growing upon the freehold, and which, while so circumstanced, are part of the freehold property, become personal by separation from the freehold, as fruit gathered, or the plants and trees themselves, or their branches when felled or lopt.

Fruit, grass,  
corn, and  
manure.

A lessee without impeachment of waste has a property in the timber trees as well as others: but unless they are severed during the term, they will not belong to him, or to his executor, but will go with the reversion in the land, being annexed to the freehold thereof. Within the description of personalty also are included the produce of the land raised by labour and manurance, as corn growing, and such like produce, and it seems also those grasses which are usually called *artificial*. So also what are generally called vegetables or garden stuff, melons, cucumbers, artichokes, &c. and obviously all manure not spread upon the land. But improvements of the natural produce; such as the increase resulting from sowing hay-seed, by trenching the ground, &c. will go to the heir. (*m*)

Inanimate goods of a moveable kind all fall under the description of personal chattels, to which class may be added property in any stock or fund.

The relation between master and apprentice is not transmissible to the executor; (*n*) though, if the parties consent, the apprenticeship may be continued with the executor in the same trade.

Apprentices.

Literary property, and the interest in a patent, by virtue of the several statutes relating to them respectively, are transmissible to the executor; (*o*) and it may be generally laid down, that whenever an absolute pro-

Literary property.

(*m*) Gilb. L. of Evid. 249. Harg. Co. Litt. 55. 11 Vin. Abr. 175.

(*n*) Strange 1266. Dougl. 70.

(*o*) Stat. 8 Ann. c. 10. 15 Geo. 3. c. 38. 17 Geo. 3. c. 57.

perty in any moveable chattels was vested in the testator, such property vests in the executor immediately on the testator's death, and in the administrator by relation from the death, wherever they are situated; the law giving a constructive possession to such representative where actual possession cannot be had.

All legal choses in action as well as equitable rights in personalty come to the executor.

He is also entitled to all personal equitable rights of his testator, and to the benefit of all personal contracts made with him. As, if a lease be contracted to be made to B., and B. die before the lease is executed, the interest vests in the executor, and the lease when made becomes assets in his hands. (*p*) So also will the damages recovered for the breach of such a contract, or money recovered by virtue of a decree. (*q*)

All debts of whatever nature or degree, due to the testator or intestate, vest, with their securities and remedies, in the executor or administrator: but the choses in action of a testator shall not be assets till they are recovered and levied; (*r*) unless indeed they are released by the executor, his release thereof being equivalent in law to a receipt of the same. (*s*) But where the cause of action arises after the testator's death, the debt or damages are assets in law before the recovery by the executor. (*t*) If a contract were made with the testator concerning his real estate only, a breach after his death gives to his heir, and not to his executor, a title to the damages.

So also, future and conditional interests in chattels.

Chattels which were never vested in the testator in possession, or which were limited to him upon a future event or condition, may come to his executor, and be distributable as assets in his hands. As where A. is entitled to a lease for years, or for his life, remainder to B., and B. dies in the lifetime of A., upon the death of A. the term shall go to the executor of B., and be assets in his hands; and even during the life of A., while it continues a remainder, B.'s executor is en-

(*p*) 11 Vin. Abr. 158, 231.

(*q*) 3 Bac. Abr. 59.

(*r*) 11 Vin. Abr. 239, 240. Shep. Touch. 497.

(*s*) Hob. 66.

(*t*) Jenkins v. Plume, 1 Salk. 207.

titled to sell such remainder for its present value, and to hold the produce as assets. So after the death of a pawner or mortgagor, the right to redeem the chattel in pawn or mortgage devolves upon his executor, and the excess in the value of the thing beyond the money paid for redemption is assets. And if a lease or other chattel were granted to I. S., on condition that if I. S. did not pay a certain sum of money, or do some specified act, within a time stipulated, the grant should be void, and the condition was not performed, such chattel interest would result to the executor, and be assets in his hands.

A man's trade or business terminates in law on his death; and if the executor carry it on, he is said to carry it on at his own risk, (*u*) even though his name should not appear in it. (*x*) But under the sanction of the Court of Chancery his representative capacity in respect to the business may be continued to him. (*y*) If he only disposes of the stock in trade, he does not thereby become a trader, or subject to a commission of bankruptcy. (*z*)

Of the testator's trade, and the consequences of the executor's carrying it on.

A contract made with, or a gift, grant, or legacy to, a man and his assigns, upon the death of the donee or grantee before performance or payment, passes to his executor or administrator as his assignee in law. (*a*) But it is to be remembered that he is only an assignee *in law*; therefore, it has been held that if A. binds himself to pay 10*l.* to the assignee of B., B.'s executor shall not have the money, because as executor he can only take to the use of the testator, though if the obligation were to pay the money to B. or *his assignee*, the right having vested in the obligee himself, would pass to his executor as assignee in law. (*b*)

Of the executor's interest in legacies, gifts, grants, and contracts, given and made, to and with his testator.

Things annexed to and consolidated with the inheritance shall accompany it; therefore, rents which are incident to the reversion, and which have not become

What chattels follow the inheritance.

(*u*) 1 T. Rep. 295.

(*y*) 2 Ves. Jun. 34.

(*a*) 11 Vin. Abr. 156.

(*x*) Cooke's Bkpt. Law, p. 67.

(*z*) 1 Atk. 102.

(*b*) 11 Vin. Abr. 161.

in arrear in the lifetime of the testator, do not belong to the executor; thus, if A. seised in fee grant a lease for years reserving rent, such rent as becomes due after his death will go to his heir, and not to his executor; and if the lessor die on the day on which the rent is payable, after sunset, and before midnight, the rent does not go to the executor, but to the heir, as in strictness it was not due till the last minute of the natural day. (c) (1) So the interest in a term for years limited in trust to attend the inheritance shall accompany the real estate; (d) and the trustee of a term raised for any special purpose shall hold the same after the purpose is answered in trust for the person having the beneficial interest in the freehold. (e)

But if, on partition of real property, one parcener enters into a bond to pay to the other, her executors or administrators, an annual sum, during the life of A. for equalizing the division, the benefit of such bond shall devolve to the executor, and not to the heir; for such annual sum was not rent, but the subject of contract. (f)

If an absolute interest in a term, or the next presentation to a living, which is a mere chattel, (g) is granted to a man and his heirs, the law will give it to the executor of the grantee. (h) But the powers and remedies incident to a rent charge descend to the heir, and accompany the inheritance, (i) though the interest acquired by the exercise of a power of entry gives only a chattel interest to the party, and this chattel interest with the arrears will go to the executor. (k)

(c) Har. Co. Litt. 202. n. 1.

(d) *Ib.* 172.

(e) 11 Vin. Abr. 171.

(f) *Ib.* 150.

(g) *Ib.* 173.

(h) *Ib.* 155.

(i) *Ib.* 147.

(k) *Ib.* and see *Jemmot v. Cooly*, 1 Lev. 171.

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(1) But where a person, having only an interest for his life in the land, demises it, and dies between the rent days, whereby the lease determines, his executors or administrators, shall in an action for the use and occupation, recover a just proportion of the rent, from the last day of payment, to the death of the testator, by statute 11 Geo. II. c. 19. sec. 15.

Things moveable in their nature, but strongly affixed to the freehold, and which cannot be separated from it without violence or injury, are members of the inheritance, and shall accordingly pass therewith to the heir, as chimney pieces, pumps, coppers, posts, window-shutters, windows, doors, wainscots, and the like, and tables, and benches when long fixed to the same ; so also pictures, if in the place of wainscot.

But it has long been the law that if a chattel is annexed to the house by the lessee, for the purposes of his trade, he may separate it during the continuance of his term, if it can be done without injury to the freehold. And the exigencies and principles of a growing commercial policy have been gradually extending the privileges of the lessee, in reference to those incidents and appendages of trade. Thus furnaces, vats for dyers, brewing utensils, and coppers for soap-boiling, cyder mills, though fixed to the freehold, have been held to belong to the executor. (*l*) And even hangings, tapestry, iron backs to chimnies, tables fastened to the floor, grates, ovens, jacks, clock-cases, have by late cases been adjudged to the executor. (*m*) The general rule however is, that the heir has a right to the freehold entire and undefaced, so that where a fixture cannot be removed without injury or disparagement, and especially where any chattel, for whatever purpose, is so affixed as to be incapable of being removed without occasioning dilapidation, or endangering or weakening the structure, it must be left for the heir, as an essential part or member thereof. (*n*)

Family portraits, the insignia, badges, or decorations of an order, ancient armour, monuments, &c. though personal chattels, are in the nature of heir looms, and

(*l*) *Lawton v. Lawton*, 3 Atk. 14, 16. *Squier v. Mayor*, 2 Freem. 249. *Harg. Co. Litt.* 53, n. 5. *Elwes v. Mawe*, 3 East. 38.

(*m*) 4 Burn. Eccl. L. 256, 7, 9. *Ex parte Quinyc*, 1 Atk. 477. *Beck v. Rebow*, 1 P. Wms. 94.

(*n*) 4 Burn. Eccl. L. 256. 3 Bac. Abr. 63. *Cawe v. Cave*, 2 Vern. 508.



descend accordingly from ancestor to heir; (o) and by special local customs, certain other chattels, which usually belong to the executor, may descend to the heir in the nature of heir looms; but, like other claims in derogation of the common law, such customs are required to be strictly proved. (p)

The beneficial interest in a mortgage, unless controlled by positive provision, belongs to the personal representative; for the fund was personal, and the contract was personal, and so shall the security be considered. Upon redemption, therefore, the heir must reconvey the land without receiving the money; (q) and the law is the same whether there was or not a personal covenant on the part of the mortgagor to pay the money. (r) After forfeiture of a mortgage, though the heir of the mortgagee was in possession by descent, and there was no deficiency of assets, the mortgagor not offering to redeem, the heir of the mortgagee was decreed to convey to the executor, who, as he would have been entitled to the money, was held entitled to the land as a recompence. (s)

If, after the mortgage is forfeited, the mortgagor release to the heir of the mortgagee in fee, the executor is entitled to the benefit of the land, although there may be no debts remaining to be paid: so the personal representative of the mortgagee is entitled to the benefit of a foreclosure. (t) But it has been held that the heir of a mortgagee in fee, if he pay the executor the mortgage money, may take the benefit of a foreclosure. (u)

But if a mortgagee in possession deals with the land as his fee and inheritance, the nature of the property

(o) Harg. Co. Litt. 18 b.

(p) *Earl of Macclesfield v. Davis*, 3 Ves. and B. 16.

(q) Harg. Co. Litt. 208 and n 1. *Ib.* 210. *Waring v. Danvers*, 1 P. Wms. 295.

(r) 11 Vin. Abr. 148.

(s) *Ellis v. Giravas*, 2 Ch. Ca. 50.

(t) *Awdley v. Awdley*, 2 Vern. 193.

(u) *Clarkson v. Bowyer*, 2 Vern. 67.



may be altered in equity. As if it appear to be the manifest intention of the testator to devise the land which he holds as mortgagee in possession, as his real estate, it will pass as such ; and the executor will not be entitled. (x)

Muniments of the land, such as charters, deeds, and court rolls, pass with the estate to the heir ; yet if these writings are placed as a deposit in the hands of another, for securing money lent, such writings are chattels in the hands of the creditor, and the interest in them will devolve to his executor. (y)

Muniments of land, &c.

If the owner of an inheritance or tithes die after they are set out, they will go to his executor, and not to his heir. (z)

Rabbits in a warren, fish in a pond, &c. pass to the executor, with his chattel interest in the land, or accompany the inheritance in its descent to the heir. Thus also trees and hedges unsevered, fruit ungathered, and grass growing, go with the land as the permanent profits thereof ; though, as we have seen, *fructus industriales*, as corn raised by artificial culture, go to the executor. And so it is with hops, though growing on their ancient roots. (a)

Rabbits in a warren, fish in a pond, fruit, grass, hops, corn, &c.

Where an executor has so mingled the property of his testator with his own, that it cannot be distinguished from it, or the property is of such a nature as not to be capable of being specifically followed, as where it consists of ready money, such property must be considered as of necessity altered. And as an executor is incapable of suing himself, he may retain his own debt out of the effects, which will amount to a conversion of the testator's property into his own, and that by mere operation of law, to the extent of his legal claim.

Of the conversion of property.

The interest of an administrator, as to the subject over which it extends, is commensurate with that of an

(x) *Martin v. Mowlin*, 2 Burr. 969. *Noys v. Mordant*, 2 Vern. 581. S. C. Prec. in Ch. 265.

(y) 3 Bac. Abr. 65.

(z) Com. Dig. Biens. A. 2.

(a) Har. Co. Litt. 55, B.

Of the interest and authority of the administrator, and the differences in these respects between particular and general administrators.

executor. And so it is even where the administration is for a limited time, so long as it lasts. But, in respect of authority, these particular and special administrations come short of that which vests in the executor and general administrator, and vary from each other in many essential particulars. To all these restricted administrations, whether *durante minoritate*, *durante absentia*, or *pendente lite*, or in whatever other form, some powers belong in common. They may do all such acts and things as will not admit of being left undone, without prejudice to that which is committed to their care. As for example, all produce which would grow worse by keeping they may undoubtedly sell. (b) They are to pay the testator's debts, and may dispose of his personal property for that purpose. (c) They may also receive debts due to the testator, (d) and may bring actions to recover them; (e) and, lastly, they may retain debts which were due to themselves from the testator. (f)

*Durante minoritate.*

An administrator, during infancy, may make leases, which will be good, till such infant executor come of age, (g) and perhaps till he avoid them by his entry. But he can do nothing to the prejudice of the infant; therefore, he ought not to sell unless there be a necessity for it; (h) nor, indeed, will his assent to a legacy be effectual, unless he has assets for its payment, (i) or his release of a debt, unless he has actually received it. (k)

Joint administrators.

A joint administration resembles in all respects a joint executorship; (l) and if one die, the right of administration survives to the others. (m)

*Durante absentia.*

By s. 4. statute 38 Geo. 3. c. 87. if an executor is absent for a year after the testator's death, out of

(b) 11 Vin. Abr. 102, 103. Cro. El. 718. 5 Rep. 9.

(c) 5 Rep. 29. n. b. Hob. 250.

(e) 2 P. Wms. 576.

(g) 6 Rep. 67 b.

(i) 5 Rep. 29 b.

(l) 2 Ves. 267.

(d) Com. Dig. Admon. F.

(f) Com. Dig. Admon. F.

(h) 2 And. 132.

(k) 1 Roll. Abr. 910.

(m) 2 P. Wms. 121.

the jurisdiction of His Majesty's Courts, and a suit is instituted in a Court of Equity by a creditor, the Court in which the suit is pending is empowered to appoint persons to collect in outstanding debts, or effects due to the testator's estate. And by sect. 7. the same powers are given to an administrator *durante absentia*, as are vested in the administrator *durante minoritate*.

As the personal goods of the deceased devolve upon the executor or administrator, he has a right to take peaceable possession of such effects; and, if resisted, he has his remedy by aciton; (o) and, on producing the probate or letters of administration at the Bank, he has a right to have the funded property of the deceased transferred into his own name.

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#### SECT. VI.

##### *Of the Remedies at Law and in Equity.*

FOR the recovery and protection of the rights and interests which are thus vested in an executor, the law has armed him with adequate means. He may bring his action in a Court of common law on a debt due to his testator on bond, or by judgment, statute, or recognizance, and also by covenant, where the subject is personalty. Whatever actions the testator might have had to enforce the performance of personal contracts, the executor is competent to bring in his representative capacity; and even where the covenant for assuring lands was broken in the testator's lifetime, the executor, though not expressly named, was held capable of bringing his action for the damages; damages being in such a case the

(o) 11 Vin. Abr. 267.

principal subject, and not accessory to the realty only. (p)

Actions also for breaches of simple contracts made with the testator, whether in writing or not in writing, express or implied, may be brought by the executor: And he may hold the defendant to bail, on an affidavit of his belief of the existence of the debt, (q) as if he swears to the books of the testator, and that he believes them to contain a true account. (r)

In what cases an executor has a remedy for a wrong done to the testator.

For injuries done to the person or freehold of the testator, or what the law calls torts, the executor has no remedy. But by virtue of the stat. 4 Ed. 3. c. 7. an executor is entitled to recover by action a compensation in damages for a trespass, in taking away the testator's goods in his lifetime; and, by an equitable extension of the benefit of that statute, he may have other remedies for injuries done to the testator's chattels, in his lifetime, as trover, for the conversion of the testator's goods, or trespass, for cutting the corn growing on his *freehold*, and carrying it away, or for entering with cattle on the testator's *leasehold* premises. (s) An executor is also, under the same beneficial construction of that statute, entitled to a debt accrued to the testator for not setting out tithes, and to the remedy for such debt given by the statute 2 and 3 of Ed. 6. c. 13. (t) In a word, the executor may have his remedy by action for every injury done to the testator's personal estate before his death. And it seems also, that he may maintain ejectment for an *ouster* of the testator, even from premises whereof he was seised in fee, proceeding for damages only, (u) as a lessee may

(p) Com. Dig. Admon. B. 13. 3 Bac. Abr. 91.

(q) 1 T. R. 83.

(r) See *Walrond v. Fransham*, Str. 1219. and Notes; and *Rowney v. Dean*, 1 Price Rep. 402.

(s) 3 Bac. Abr. 91. 1 Vent. 187.

(t) 1 Sid. 88, 497. 1 Vent. 30.

(u) 1 Vent. 30. *Doe v. Potter*, 3 T. R. 13. Co. Litt. 285.

do where his interest expires, pending the suit. If the premises were leasehold, he is entitled to his ejectment for recovering the term by the common law. And on the same authority he may avow for rent in arrear at the testator's death, as incident to a reversion for years. (x) He may also have his action of replevin for goods distrained in the testator's lifetime. (y)

In numerous cases too, where the cause of action has happened since the testator's death, the executor may bring his action *as such*, where the subject of the action vests in him in that capacity. Thus he may maintain *quare impedit*, where the testator died possessed of a term in an advowson, and the disturbance was after such death; as he also might where the testator died within six months after the usurpation. (z) So also wherever a debt arose after the testator's death, upon a contract made with him in his lifetime, or where a bond was forfeited, or the goods taken after that event. And he may avow in that character for rent of leasehold premises, becoming due from the under-tenant after the testator's death. (a) In like manner he may bring an action as executor, wherever a contract is made with him as such.

Where the cause of action has happened since the testator's death.

Where he is plaintiff in an action, which he *must* bring in his representative capacity, he pays no costs, either on a nonsuit or verdict: but if he *may* bring the action without naming himself executor, there he is liable to costs, whether he names himself executor or not, if he fail. As where in trover, both the trover and conversion were subsequent to the death of the testator; (b) or where he proceeds in *assumpsit* for monies had and received after that event. Nor will he be exempt from costs where he fails through his own mispleading, (c) gross misconduct, or wilful default. For

When an executor is, and when he is not, liable to costs.

(x) 1 Roll. Abr. 672.

(y) 1 Sid. 82. Gilb. L. of Dist. 3 ed. 156.

(z) Poph. 189. 4 Leon. 15.

(b) 7 T. R. 358.

(a) 11 Vin. Abr. 204.

(c) 6 T. R. 654.

an escape out of execution on a judgment obtained by the testator, whether the escape happened in the lifetime, (e) or after the death of the testator, (f) the executor may have his remedy to recover against the sheriff, in his representative capacity; so also where the escape happened on a judgment recovered by himself as executor. (2)

Of the relief  
given by the  
statute 17 Car.  
2. c. 8.

At common law, if the plaintiff died after final judgment, and before execution, the executor or administrator might proceed to execution by first suing out a *scire facias*; and, if the testator died after execution by *fieri facias* had been taken out by him, the sheriff might go on to levy the money, and might pay it over to the executor. If the plaintiff died at any time before final judgment, the suit abated, and the executor had to begin afresh. But by the statute 17 Car. 2. c. 8. if either the plaintiff or defendant in a cause die after verdict, and before judgment, the death shall not be alleged for error, so as the judgment be entered within two terms after the verdict; and if the death take place *after* the assizes have commenced, though *before* the verdict, the case is remedied within the act. On this statute the judgment is entered as if the deceased party were still living; (g) but before execution can be had upon it, there must be a *scire facias* to re-

(e) Cro. Car. 297. Dy. 322.

(f) 3 Bac. Abr. 57.

(g) 1 Salk. 42.

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(2) 2 T. R. 128. Whether an action does or does not lie for an escape in the testator's lifetime, depends upon the distinction between a tort which does, and a tort which does not, vest an interest in the party wronged. In the case of a *mere tort*, the rule of *actio personalis moritur cum persona* strictly holds. Thus an executor cannot maintain an action on the case for an escape on mesne process in his testator's lifetime. But for an escape out of execution in his testator's lifetime, an executor may have his action on the case, on the equity of the stat. 4 Ed. 3. In the case of a *devastavit*, that being a wrong vesting an interest, and a debt arising *ex delicto*, the action survives to the executor. See *Berwick v. Andrews*, 2 Lord Raym. 971. But an action will not lie against an executor for an escape in the lifetime of his testator.

vive it, and judgment must be entered within two terms after the verdict, and such *scire facias* must proceed as on a judgment against the party, as if he were living.

By the statute 8 and 9 W. 3. c. 11. sec. 6. provision has been made for the death of the plaintiff, after interlocutory, and before final judgment. The action in such case shall not abate, if it were of such a nature as might have been originally brought by the executor or administrator, but the executor or administrator shall have a *scire facias* against the defendant; or if the defendant die after such interlocutory judgment, against his executor or administrator. And if the defendant, his executor or administrator, appear, and shew no cause to arrest the final judgment; or on a *scire facias*, or two *nihils*, make default, a writ of inquiry shall go; and being executed and returned, judgment final shall be given against the defendant, or against his executor or administrator. On this latter statute the judgment is to be entered for or against the executor or administrator, and not as under the stat. 17 Car. 2. for or against the party himself.

Of the relief given by the statute 8 and 9 Wm. 3. s. 6.

As a temporary executor may bring actions as well as an executor generally constituted, so the same right devolves upon the executor of an executor by virtue of the statute 25 Ed. 3. c. 5. The husband of an executrix has also the full right of bringing actions: but he cannot sue in the representative capacity without joining his wife. As co-executors make but one person, in consideration of law, they must all join in such actions as are brought in this right, even those who have not proved the will. (*h*) And, to prevent collusion between a debtor and a co-executor, the law has provided that if one executor refuse to join his companion in an action for recovering a debt due to the testator's estate, the willing executor first commencing the suit in the names of both, may afterwards, by summoning the other,

Temporary executor; executor of an executor; husband of an executrix; co-executors.

Summons and severance.

(*h*) Com. Dig. Pleader, (2 D.1.)



obtain what is called a judgment of severance, which is an authority to sue alone; and the same judgment shall be given for default upon the summons; and then the executor so having summoned may proceed without the other, and the judgment and execution shall be in the name of the executor so proceeding alone. (*i*) So that if the party severed die pending the proceedings, the suit shall not abate. (*k*)

Of the remedies of an administrator.

An administrator has legal remedies corresponding and co-extensive with those of an executor. Even where their authority is special and limited, they may maintain actions for recovering the property of their intestates. (*l*)

If the limited office of an administrator durante minority expire after judgment obtained by the executor's attaining his age, such executor may have a scire facias to execute the judgment. (*m*)

Of the consequences of the deaths of executors or administrators as to suits depending.

The distinctions in respect to the prosecution of suits interrupted by the deaths of the personal representatives should be carefully attended to. By statute 17 Car. 2. c. 8. an administrator de bonis non is rendered capable of suing a scire facias on a judgment after verdict recovered by an executor or administrator; which he could not do by the common law. And if the executor or administrator had sued execution, and before the return died, the administrator de bonis non, by the equity of the above statute, is permitted to perfect execution. (*n*) If, at the time of the executor's or administrator's death, the money was actually levied, it shall be brought into court; and the administrator de bonis non, on producing his letters of administration, shall be entitled to receive it. (*o*) And so it is said he would, even if the judgment had been by default. (*p*) The statute extends only to judgments after *verdict*, so

(*i*) 3 Bac. Abr. 33. Cro. Car. 420.

(*k*) Co. Litt. 139.

(*l*) 2 P. Wms. 576.

(*m*) 3 Bac. Abr. 18. Cro. Car. 127.

(*n*) 2 Lord Raym. 1072.

(*o*) 2 Lord Raym. 1074.

(*p*) 6 Mod. 299.



that if the executor or administrator dies after obtaining judgment without a previous verdict, the case is at common law, and the administrator de bonis non, on account of his paramount title and want of privity, being representative of the first testator or intestate, is obliged to recommence the action. (*q*) But if such judgment were for goods taken out of the executor or administrator's own possession, the immediate representative of such executor or administrator shall have scire facias, and account with the administrator de bonis non. (*r*)

If an administrator durante minoritate obtain judgment, he may have a scire facias against the bail, even after the executor has attained his age, though it seems doubtful whether he or the executor shall sue execution. (*s*)

An executor may prove a debt due to his testator under a commission of bankruptcy, and may sign as such the certificate: but if he has a demand of his own against the estate, as well as one in right of his testator, he will not be allowed to sign in both capacities. (*t*) The executor of the bankrupt is entitled to his allowance. (*u*)

*Of proof under bankruptcy.*

Where an executor finds the administration of his testator's property embarrassed, difficult, or hazardous, he may have the claims of the creditors adjusted by a court of equity, by instituting a suit against the creditors for that purpose. (*v*)

*Of obtaining an adjustment of the claims in equity.*

In equity one executor may sue his co-executor; and if co-executors commence proceedings in that court, and one of them die, the suit will not abate.

*Of the remedy of an executor against his co-executor in equity.*

If pending a suit the plaintiff die, his executor may continue it by bill of revivor. And if a bill be brought by an administrator durante minoritate, and pending the

(*q*) Cro. Jac. 4. 1 Roll. 5 Rep. 9 b.

(*r*) Yelv. 33.

(*s*) 2 Lev. 37. (*t*) 1 Atk. 85.

(*u*) Id. 208, 209.

(*v*) Com. Dig. Chancery, 3 G. 6.

suit the executor come of age, he may continue the suit by a supplemental bill. (x)

Of injoining the publication of private letters of the testator.

An executor may have relief by injunction in equity to restrain a person in possession of private letters of the testator from publishing them without the permission of the plaintiff. (y)

Where a partner in trade dies, who succeeds to his interest in the stock.

Upon the death of a partner in trade, his interest in the stock devolves upon his executor or administrator; and shall not survive to the surviving partners, although the remedies for recovering the joint property survives. Equity treats the survivor as a trustee for the representatives of the deceased partner who are considered as having a specific lien on the share of the deceased. (z)

Of refunding by legatees, when the assets are insufficient to satisfy all.

When an executor has admitted assets, a bill may be filed by a legatee in equity; and an admission of assets to one of several legatees is an admission to all. (a) So a payment of one legacy raises a presumption of assets sufficient to pay all legacies; and the executor, if solvent, will be obliged to pay all the other legatees in full; nor will equity countenance a bill by the executor against the paid legatee to compel him to refund. (b) If an executor be insolvent, equity will restrain him from acting, and appoint a receiver of the testator's assets in his place. (c)

The legatees cannot, except in the case of collusion, follow the assets when the executor, (who has complete power over the personality) has misapplied them by an entire payment to a particular legatee. (d) But, on a bill filed against the executor, he will be directed to pay

(x) Mitf. Plead. 61.

(y) Ambl. 737.

(z) 1 Ves. 242.

(a) Cook v. Martyn, 2 Atk. 3.

(b) Orr v. Kaines, 2 Ves. 194. and see Copin v. Copin, 2 P. Wms. 296.

(c) Utterson v. Mair, 2 Ves. J. 98. M'Leod v. Drummond, 14 Ves. J. 361. 17 Ves. J. 153, 170.

(d) Keane v. Roberts, 4 Madd. 330, 353.

the balance into Court. (e) And if he wastes the assets and becomes bankrupt, the legatees may prove against him under his commission to the extent of the fund wasted. (f)

Where there were not assets, at the time of the death, to pay both debts and legacies, an unsatisfied creditor may compel a satisfied legatee to refund ; and an unsatisfied legatee may compel him to refund in proportion, in case the executor, who is personally liable in the first instance, is insolvent. (g) But where, at the time of the death, there were assets sufficient to pay both debts and legacies, neither an unsatisfied creditor or legatee can compel a satisfied legatee to refund, though the estate may have been since rendered inadequate by the executor's mismanagement. (h)

Where an executor having wasted the assets becomes a bankrupt.

(e) *Curgenven v. Peters*, 3 Anst. 751.

(f) *Ex parte Shakeshaft*, 3 Bro. C. C. 197.

(g) See 1 P. Wms. 495.

(h) See Opinion of P. Wms. on *Anon.* 1 P. Wms. 495.

## CHAP. II.

## DUTIES OF EXECUTOR AND ADMINISTRATOR.

## SECT. I.

*Of the duties of an Executor and Administrator in respect to the Funeral and Official Charges, and payment of Debts.*

Of the funeral and testamentary charges.

TO provide for the funeral is naturally first in order ; an office which may be discharged before probate, and the expenses connected with which stand in priority before all other debts and charges : (a) but extravagance should be avoided, as unnecessary expense will not be allowed against the creditors. The amount should be regulated with reference to the circumstances of the deceased.

The proving of the will is the duty and charge which the executor is next called upon to perform and satisfy. The inventory succeeds, which, in pursuance of the bond to be entered into according to the stat. 22 and 23 Car. 2. c. 10. must exhibit a true and perfect account of the goods, chattels, and credits, of the deceased which have come to the possession of the executor ; and though no such inventory is, in practice, exhibited in general cases, yet an executor or administrator is always subject to be cited for that purpose in the spiritual court ; and the spiritual judge will, in special cases, at the instance of a party interested, decree an inventory to be exhibited before the issuing of the probate or letters of administration, and the same must be substantiated by a special oath. (b) An inventory, after being exhibited on oath, cannot be impeached in the ecclesiastical court ; yet objections may be made to it which

(a) 11 Vin. Abr. 432.

(b) 4 Burn's Eccl. L. 266.

must be answered upon oath : but such oath cannot be contradicted : the more effectual relief lies in a Court of Equity.

The next duty of an executor or administrator is the payment of the debts of the deceased which must be done in the legal order.

*Of the legal order in which debts are to be paid.*

First, the debts due to the crown by record or specialty.

Secondly, those arising upon certain statutes.

Thirdly, debts of record in general.

Fourthly, debts due by specialty in general.

Fifthly, debts due by simple contract.

And here it may be observed, that all obligations or specialties to the use of the king are of the same nature as a statute staple : (c) but, to be entitled to this paramount preference, the debts to the king must arise by record or specialty ; and therefore all debts to the king which are of no higher degree than simple contracts, though they are to be preferred to debts by simple contract due to the subject, are nevertheless inferior in rank to debts of record or specialty due to the subject : thus fines and amerciaments arising to the king in courts baron, or courts not of record, or for copyhold estates, or forfeitures by outlawry or attainder before office found, are not entitled to the preference above stated to belong to the crown. But if the king's immediate debtor be outlawed, then whether such debt becomes a debt of record by the outlawry or not will depend upon the fact whether it be on mesne process, or after judgment. In the former case it is not, in the latter it is, a debt of record. (d)

And if a debt by specialty be assigned to the king, his prerogative does not attach upon it, so as to entitle it to payment by the executor before bond or judgment creditors. (e) It is said also that rents due to the Crown have only the rank of simple contract debts. (f) The

(c) Dalt. Sheriff. 55, 123.

(d) 11 Vin. Abr. 291. 3 Bac. Abr. 80.

(e) 11 Vin. Abr. 301.

(f) 3 Bac. Abr. 80.

forfeitures on some particular statutes come next to the debts to the Crown by record ; as the forfeiture for not burying in woollen by 30 Car. 2. c. 3. ; money due from the overseers of the poor by 17 Geo. 2. c. 38. s. 3. ; and to the post-office for letters by 9 Ann. c. 10. s. 30.

Next to the king's debts of record, with the exceptions above mentioned, debts due upon judgments (that is, upon judgments against the testator,—not the executor,) in all courts of record, or decrees in Equity, (g) are to be paid, whether such judgments be voluntary or *in invitum*. Nor is there any distinction between judgments actually entered up against the testator, and those which are entered up after his death, but which relate to a verdict obtained in his lifetime, and are therefore to be regarded as if given in his life-time, under the stat. 17 Car. 2. c. 8., or those which, being signed at any time during the term or the vacation immediately subsequent, relate back to the first day of the term by the common law, although the defendant died before the signing. (h) It seems, however, that a final judgment entered up against the testator after his death, grounded upon an interlocutory judgment obtained against him in his lifetime pursuant to the stat. 8 and 9 Wm. 3. c. 11. being to be entered against the representative and not the intestate himself, cannot be pleaded by an administrator to an action brought against him on his testator's bond. (i) Priority of judgments does not depend either upon the dignity of the court (provided it is a court of record,) or upon the original cause of action. It is of the same strength whether the debt was by simple contract or by specialty. (k)

Between judgments, priority of time is immaterial—the executor may satisfy which he pleases, unless a preference has been gained by a *scire facias* sued out upon the judgment. But if two judgment creditors take out, each of them, a *scire facias*, the executor may give a preference to that upon which the *scire facias* was

(g) 2 Fonbl. 412. n. (s) (h) 6 T. Rep. 368. 7 T. R. 20.

(i) Com. Dig. Pleader, 2 D. 9. (k) 11 Vin. Abr. 296. *et seq.*

last sued out, by confessing the action. (*l*) A judgment in a foreign country has the rank only of a simple contract debt; (*m*) and so it is with respect to a judgment not docketed according to the stat. 4 and 5 W. and M. c. 10. (*n*) In such a case the docketing is the only notice that the executor need attend to: but, as the statute does not extend to judgments in inferior courts of record, the executor must take notice of them at his own peril. (*o*) There must be actual or implied notice of a decree to make an executor liable for not giving it its preference, and the only implied notice has been held to be the pendency of the suit. (*p*) But the executor must have his protection and indemnity for such payments under decrees against suits by the other creditors, by application to equity for an injunction. (*q*) Debts due upon recognizances, such as are usually entered into before a court of record, or a magistrate duly authorised, to appear at the assizes, to keep the peace, to pay debts, &c. statutes merchant, statutes staple, and recognizances in the nature of statute staple (which last description of securities are now but little used) come next; and the date of them is immaterial, with respect to the payment.

Debts by specialty are next in rank to debts of record, as for rent, (whether such rent be reserved by lease in writing or by parol,) (*r*) or on bonds, covenants, and other sealed instruments; and these debts are all, *inter se*, of equal dignity. The profits of the land leased are, in all cases, to be applied by the executor to the payment of the rent; and if they are insufficient to answer such rent, the residue is payable out of the general assets, as other debts by specialty. A bond, even before it is due, ranks before a simple contract debt; and the executor may plead the *existence* of such a bond in defence to an action by a simple contract cre-

(*l*) Vin. Abr. 299.

(*m*) 11 Vin. Abr. 291. Doug. 1.

(*n*) 3 Bl. Com. 397. 6 T. Rep. 384. 1 Bos. and Pul. 307.

(*o*) 3 P. Wms. 117. (*p*) 2 P. Wms. 482. 2 Fonbl. 156. not. (*n*.)

(*q*) 3 P. Wms. 401. not. (F.)

(*r*) 3 Bac. Abr. 82, 96.

ditor. (s) But the executor ought not to pay the money upon a bond *not yet due* in preference to a bond-debt already due: and the liability upon a contingent security, before the contingency happens, shall not be admitted to delay the payment of a simple contract creditor. (t) Where the contingency has taken place, it is as if there had been no contingency at all. (u)

Simple contract debts are to be preferred to bonds *merely voluntary*: but such bonds are, nevertheless, to be satisfied before legacies. (v)

The next order of debts are those arising upon simple contract: but it seems that, among debts of this description, the claims of the King are to be first satisfied; (w) and, with that exception, the executor may prefer whom he pleases in the order of payment, among the creditors of this class, except that it has been said that the wages of servants are entitled to a preference. If an action be actually brought against an executor for a debt of the testator, a right is gained to the payment of that debt in preference to the other debts of the same degree. (1) But if another creditor of the same class afterwards brings his action, and first recovers judgment, he must first be satisfied; and the executor may accelerate such right by confessing judgment to the action latest brought. (x) Such confessed judgment, though entered after an interlocutory judgment obtained at the suit of another, shall stand before it in the order of payment. (y) But it has been recently decided that the contrivance of an executor to extend this

(s) 3 Bac. Abr. 81. (t) 11 Vin. Abr. 105. (u) 5 T. Rep. 307.

(v) Ca. temp. Talb. 156. (w) 3 Bac. Abr. 80. in not.

(x) 11 Vin. Abr. 296. 1 P. Wms. 295. (y) 2 Atk. 386.

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(1) It is true, that where an action is brought by a creditor of the testator against his executor, he is restrained from paying any other creditor in equal degree; yet any of the creditors may file a bill in a court of equity against the executor for an account, in which case all the creditors may, as it seems, be compelled to take an equal distribution of the assets.



preference by confessing a judgment to one creditor as a trustee for many others, cannot be supported. (z) This power of preferring one creditor to another in equal degree may, under particular circumstances, be exercised in furtherance of justice: but the general duty of an executor is, certainly, to make an equal distribution among creditors in equal degree. Notice of a specialty debt obliges the executor to the payment thereof, before any debt of inferior degree; nor is it material in what manner such notice comes to him. *Lis pendens* is always notice; and of debts of record an executor is bound to take cognizance, provided they are docqueted, where the statute requires it.

Without actual notice, or what the law considers as notice, the executor is justified in paying an inferior debt, although a superior debt should thereby go unsatisfied. But this should not be done with such precipitance as not to leave time to specialty creditors to give notice of their debts; as unreasonable haste would be evidence of fraud. And it is to be observed that an executor acts illegally in confessing judgment to an action for an inferior debt, after notice of the existence of one of a higher description. (a)

An executor may retain out of the assets in his hands the amount of a debt of his own, in preference to all the debts of other persons standing in equal degree: but he has no such advantage against those whose debts are above his own in degree. If the same person is executor of both the obligor and obligee, or executor of the one and administrator of the other, he may retain, as the representative of the debtor, the amount of the debt owing to him, as representative of the creditor. (b) And this right of retention devolves to the executor of an executor. (c) A special executor or administrator, whose authority is limited as to time, or extends over only a part of the assets, possesses the

(z) 1 M. and S. 395.

(b) 11 Vin. Abr. 263.

(a) 1 T. R. 690.

(c) 11 Vin. Abr. 263.

same privilege *pro tanto* ; and though an *executor de son tort* has no such right, yet if administration be granted to a creditor, and afterwards repealed at the suit of the next of kin, such creditor may, nevertheless, retain against the rightful administrator. (d) And if a creditor, being appointed executor with others, refuse to administer, he may sue the other executors for the debt. (e) If a surety in a bond be made the executor of his principal, and after his death is compelled to pay the bond debt, this does not give him a right to retain on the footing of a bond creditor on his testator's estate ; but it has been said that it authorises him to retain in quality of a simple contract creditor. (f) But in all these cases it is to be remembered that an executor shall not be allowed to retain his own debt, to the prejudice of his co-executor in equal degree, but the assets shall go in discharge of both their debts in the same proportion. (g)

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## SECTION II.

### *Of the duty of Executors as to the Payment of Legacies.*

The principal doctrines and decisions concerning legacies, in general, have been treated of in the former Volume. This section will therefore be confined to the mere duty and office of the executor concerning them.

As to the necessity for the assent of the executor ; its effect.

To the official duties of the executor, every other claim under the will, as to the personal property of the testator, is subordinate : and it is his duty to see that the fund is first applied to the satisfaction of the *creditors*. The personal property devolves first upon him to enable him to fulfil his primary duty of paying his testator's debts. No legacy, therefore, takes effect in the legatee, until executed by the assent of the execu-

(d) 11 Vin. Abr. 265.

(e) 11 Vin. Abr. 262.

(f) Toll. Ex. 2d Edit. 298.

(g) 11 Vin. Abr. 72.

tor: but the assent of one of several executors is sufficient. (a) And if, notwithstanding a deficiency of assets, he pays legacies, he makes himself responsible to the creditors to the extent of the legacies so paid.

This assent of the executor is equally necessary, whether the legacy be general or specific. And if the legatee, in either case, takes the thing bequeathed, without such assent, he is liable thereby to an action of trespass by the executor. Even if the chattel be in the hands of the legatee at the time of the testator's death, he cannot retain it against the demand of the executor.

Difference as to the effect of assent in the cases of general and specific legacies.

If such legacy is payable out of the general funds of the testator, the law will not raise an implied promise on proof of an acknowledgment of assets, so as to enable the legatee to bring an action at law; the reasons of which rule are well expounded in *Deeks v. Strutt*. (b) In the case of the bequest of a specific thing, the assent passes the legal title under the will. (c) The rule is the same, whether the subject of the bequest be a personal or real chattel. And the assent of the executor vests the term, or other specific thing bequeathed, in the legatee, from the death of the testator, by relation. (d)

As this interest is vested in the executor for the sake only of other persons, it is compatible with an interest vested in the legatee, which, if he die before the executor's assent, passes to his personal representatives.

Even the release of a debt by the will of a creditor, and which operates by extinguishment rather than by donation, is so far in the nature of a legacy, that, to be complete and effectual, it ought to have the executor's assent. (e) But in all cases, and in the last more espe-

(a) Com. Dig. Admon. (c. 8.) (b) 5 T. R. 690.

(c) Doe d. Lord Saye and Sele v. Guy, 3 East. 120. and see *Paramour v. Yardley*, Plowd. 539.

(d) *Saunders's Case*, 5 Rep. 12 b. *Chamberlain v. Chamberlain*, 1 Chan. Ca. 256. *Bastard v. Stukeley*, 2 Lev. 209. *Barton's Case*, 2 Freem. 289. *Chandos v. Talbot*, 2 P. Wms. 610.

(e) 2 P. Wms. 332.

cially, a slight expression, or demonstration of assent, is sufficient.

What amounts  
to an assent.

The assent of an executor may be inferred from his acts, and such constructive assent will be as available as an assent positively and expressly given. Thus any recognition of the property or right of the legatee amounts to such assent ;—as, if the executor, in any manner, deals with the legatee as the owner. (*f*) If a term of years be devised to one for life, remainder to another, the assent of the executor to the first devise operates as an assent in favour of the remainderman, (*g*) and an assent to the remainder is an assent to the preceding estate ; for, in legal consideration, they make together but one estate. (*h*) Nor can the executor give such assent, upon terms which subject it to be withdrawn upon any subsequent event : but he may impose a condition, precedent to the payment of the legacy, though he cannot encumber it with future stipulations : and whenever the assent is given, it must relate to the testator's death, and perfect the title of the legatee, *ab initio*. An assent to a devise for a lease for years is also to be considered as an assent to all conditional springing and derivative interests, coupled with it by the devise. (*i*) Thus, an assent to the devise of a term in land is an assent to rent or common, devised out of it. (*k*) Though it is said that if a man have a lease for years, and devise out of it a rent or common to A., and devise the lease itself to B, and die, and his executors pay the rent, or assent that A., the devisee of the common, shall put in his cattle and use the common, this is no assent that B. shall have the term, for they are distinct things. (*l*)

An assent by one named executor in a will is of no avail, unless he has attained the age of twenty-one

(*f*) 4 Bac. Abr. 445. 2 Vent. 358.

(*g*) 1 Roll. Abr. 620. Plow. 545 n.

(*h*) Com. Dig. Adm. (c. 6.)

(*k*) 1 Roll. Abr. 620.

(*i*) 1 Roll. Abr. 620.

(*l*) Plow. 521.

years : (*m*) but, as we have seen, he may consent, before taking out probate.

If a power is given to an executor to divide money among children at his discretion, his disposition thereof must not be unreasonable; and where a grossly unequal distribution, under such circumstances, has been made, equity has set it aside, and decreed a more equal division. (*n*) But an equal distribution may not, in some cases, be a reasonable distribution; and in one case the Court decreed a double amount to one who stood in greater need of it than the other objects of the distributive bequest. (*o*) In the exercise of such discretionary authority the executor may vary the amount among the objects; but not in an illusory or plainly inequitable manner. (*p*)

Where the executor has a discretion as to the division, how it is to be exercised, and controuled.

And, where a legacy was given, to be disposed of among such of the testator's relations, at such times, and in such proportions, as the executor in his discretion should judge most proper, he was not restricted in his selection to the next of kin. (*q*) If a suit is instituted, the course appears to be to refer it to the master, with liberty for the defendant to lay a scheme before him for the disposition of the fund, that the Court may be satisfied that the whole fund is applied. (*r*)

Where, however, a testator bequeathed 400*l.* a piece to two of his sisters, and to his third sister, what his executors should think fit, the Court decreed that the third sister should have 400*l.* also, if the estate of the testator would afford it, to place her upon an equality with her sisters. (*s*)

An assent to a void legacy must necessarily be itself void, upon the same principles as an attornment to a

Of the executor's execution of a legacy to himself.

(*m*) Stat. 38 Geo. 3. c. 87.

(*n*) 4 Bac. Abr. 340. 2 Ves. 640.

(*o*) 2 Vern. 421.

(*p*) 5 Ves. J. 149. 7 Id. 124. 9 Id. 382. and see *French v. Davidson*, 3 Madd. 396. See also *Bennett v. Honeywood*, Ambl. 710. *Supple v. Lawson*, Ambl. 729. *Forbes v. Ross*, 2 Cox C. C. 113.

(*q*) *Supple v. Lawson*, Ambl. 729.

(*r*) S. C.

(*s*) *Wareham v. Brown*, 2 Vern. 22.

void grant is without effect in the law. (*t*) Where an executor is also a legatee, his assent is necessary to vest the legacy in him in the capacity of legatee; and until he is acquainted with the competency of the assets, he cannot claim it as such. If he enters or takes possession generally, without claim or demonstration of his election, it is said he shall have it as executor, and not as legatee; (*u*) and it follows upon principle, that an executor's execution of a legacy to himself must operate as a confirmation of an ulterior interest in another person in the same thing. (*v*) His consent to his own legacy may, like his assent to the legacy given to another, be express or implied. His acting upon it in any manner as a legacy, and still more his declaration that he takes it as such, constitutes an assent effectual to render him a legatee. (*w*) And, in the case of a devise to several executors, one of them may assent for his own part. (*x*)

Where a legacy is given to an executor, what he must do to entitle himself to it.

If a legacy is given to an executor as such, or to one by name, who is by the same will appointed executor, he must take upon himself the burthen, in order to entitle himself to the benefit; (*y*) and that whether the legacies were left him expressly for his care and trouble or not. Taking out probate is generally enough to entitle him. (*z*) And where he has died before probate, his concurrence in the directions and disbursements for the funeral, though slight, and of trifling amount, has been held sufficient to entitle him even where the legacy was given to him expressly for his care and loss of time. (*a*) If the bequest is to

(*t*) Vin. Ab. tit. Devise, E. a. 2. pl. 2.

(*u*) Dy. 277. 1 Roll. Ab. 61. 10 Rep. 47 b.

(*v*) *Paramour v. Yardley*, Plow. 541.

(*w*) 1 Lev. 25. 1 Roll. Ab. 619. 620. Plow. 539. Dy. 277.

(*x*) 1 Roll. Abr. 618.

(*y*) *Currie v. Pye*, 17 Ves. J. 466. *Reed v. Devaynes*, 2 Cox C. C. 285. *Stackpoole v. Howell*, 13 Ves. J. 417. *Freeman v. Fairlie*, 3 Meriv. 31.

(*z*) *Reed v. Devaynes*, 2 Cox C. C. 285.

(*a*) *Harrison v. Rowley*, 4 Ves. J. 212.

the executor, who takes out probate, but makes it evident from his subsequent conduct that the same was obtained without a real intention to do the duties belonging to the office, the executor it is conceived would be held not entitled, for it would be a fraud upon the testator's bounty. And it may be safely assumed that if the executor acts in opposition to the will, or renounces the office, or refuses to act, he forfeits the legacy, which is considered as given to him upon an implied condition that he will both prove the will and act in the execution thereof. (b) Though it has been held, where a testator expressed his bequest to his trustee to be meant as a token of regard, and directed it to be paid to him within twelve months, that such legacy was not forfeited by his not acting in the execution of the trusts. (c)

To the proper discharge of this branch of an executor's duty, a knowledge of the rules and circumstances which have decided the important question when legacies and legatory portions are to be considered as vested, and when and from what time interest is to be paid upon them, is very material.

Of the time  
of vesting.

And under this head it may be proper to premise, that the year given to the executors for collecting the assets does not prevent the vesting; and that consequently the money must be paid to the representative of the legatee, dying before the end of the year. (d)

For a vested legacy is of consequence transmissible, being one which takes effect in the legatee as an *interest* certain, though the title to the possession may be either present or future. Indeed the possession may be contingent as well as future, and yet the interest in such contingency may be a transmissible interest; which will depend upon the nature of the contingency; for if the uncertainty on which it depends has no connection with the legatee, nor depends upon the description

(b) *Abbot v. Massie*, 3 Ves. J. 149. *Harford v. Browning*, 1 Cox 302. *Reed v. Devaynes*, 2 Cox C. C. 285.

(c) *Brydges v. Wotton*, 1 Ves. and Beames 137.

(d) 10 Ves. J. 13.



of the legatee, as, where the bequest is to one, in case another leaves no issue at his death, the legatee, though he has not properly a vested interest, may be said to have a vested right to the contingent benefit; which right will, in case of his dying before it happens, pass to his representatives. (c) Whereas if the legatee is himself connected with, or a part of the contingency, as where the bequest is to one living at the decease of another, or at any particular period, there nothing vests in such legatee, no transmissible right or interest whatsoever; but the expectation dies with him if he dies before the event on which the contingency was suspended. (d)

Of legacies  
coupled with  
conditions.

Legacies may be coupled with conditions properly and strictly so called. And where such condition is precedent to the vesting, the legatee takes no interest until the condition is performed. Of which description is a legacy to A. at twenty-one, or if or provided he shall attain twenty-one, or be married with consent, there no interest in the legacy will vest in A. until the condition is fulfilled. If he die before he attains the prescribed period, the legacy lapses; and his representatives have no claim. (e) So if there is a bequest to A. in case he shall be living with me at my death, or in case he shall be living at the death of B. (f) Or the condition, though precedent, may be precedent only to the payment, in which case the legatee has an interest immediate with a suspended right to the possession and enjoyment. Thus, where a legacy is given to A., to be paid or payable at his age of 21, or when he shall attain that age, or at any other

(c) *Meldicot v. Bower*, 1 Ves. 208.; and see *Anon.*, 3 Ventr. 347. and *Pinbury v. Elkin*, 1 P. Wms. 363.

(d) *Hodges v. Peacock*, 3 Ves. J. 735. *Glanvill v. Glanvill*, 2 Meriv. 38.

(e) *Hansom v. Graham*, 6 Ves. J. 239. *Atkins v. Turner*, 2 Atk. 41. *Sansbury v. Reed*, 12 Ves. J. 75. *Hixon v. Oliver*, 13 Ves. J. 108. *Fonnereau v. Fonnereau*, 1 Ves. 119. *Seamer v. Bingham*, 3 Atk. 57. *Goss v. Nelson*, 1 Burr. 227. *Hatch v. Mills*, 1 Eden. 341.

(f) *Allen v. Callow*, 3 Ves. J. 294. *Parsons v. Parsons*, 5 Ves. J. 581.



fixed period, such legacy is immediately on the death of testator vested in the legatee as *debitum in præsentisolvendum in futuro*, the time not being in such case annexed to the gift itself, but to the payment only; so that if A. die before the condition is satisfied by the arrival of the prescribed period, his personal representative, or his assignee, will be entitled to the legacy. (g) And where the time of payment is left to the discretion of the executor, the interest may nevertheless vest in the legatee; as where the bequest was to A. to be paid to him at 25, or between 21 and 25, if the executors should think proper so to do, and if A. should not receive or dispose of such legacy, then the bequest was given over; it was held that on the testator's death the legacy vested absolutely in the legatee. (h) And where a testator left a sum of money to A. when he should attain 25, directing that interest should be paid for his education, with a power to the trustees to advance money to bind him an apprentice, the remainder to be paid when he should attain 25, and not before, and A. survived the testator and died before 25: it was held that the legacy was vested, it being the apparent object of the testator to point out the time of payment, and not the period of vesting. (i) In these cases if the sum bequeathed is to be paid with interest, the executors of the legatee surviving the testator, and dying before the time of payment, become entitled immediately upon such death: but if not payable with interest, then they become entitled only when the legatee would have arrived at the age to receive the legacy. (k)

(g) *Steadman v. Palling*, 3 Atk. 427, 572. *Sibthorpe v. Moxom*, 3 Atk. 581. *May v. Wood*, 1 Bro. C. R. 120. *Reeves v. Brymer*, 4 Ves. J. 692. *Hanson v. Graham*, 6 Ves. J. 245.

(h) *Ross v. Ross*, 1 Jac. and Walk. 154.; and see *Churchill v. Speake*, 1 Vern. 251.; and *Fonnereau v. Fonnereau*, 3 Atk. 644.

(i) *Hanson v. Graham*, 6 Ves. J. 244. *Branstrom v. Wilkinson*, 7 Ves. J. 421. *Lane v. Goudge*, 9 Ves. J. 230.

(k) 11 Vin. Abr. 160.

Where the time to which the benefit is postponed seems in expression to be annexed to the gift itself, the purposes of the bequest may still be such as to make it a vested interest immediately upon the testator's death. As where an interest in the subject of a legacy is bequeathed to one for life, and at or after his death to another, by such expressions the time only when the legacy is to take effect in possession is considered as being indicated; the testator appearing to have in view a succession in the enjoyment, and not a conditional gift over to depend upon survivorship. (*l*)

Where the payment is made to depend upon a contingency.

Although the payment is expressed in terms importing a contingency, this will not suspend the vesting of the gift itself. As if a legacy is bequeathed to A. payable if he shall attain the age of 21, or payable to him at 21 or marriage. (*m*) Though it has been held that if the payment is made to depend singly upon the marriage of the legatee, so that the condition is essential to the gift, it must be construed as a condition precedent, and the vesting must be suspended upon it. (*n*)

Of the vesting by implication.

A legacy may be made to vest before the time of payment by implication merely. As where the interest is given to the legatee in the mean time; (*o*) for interest arises from the principal, and supposes the same to have come into existence and effect: it is in its nature substitutionary, and a sort of recompence for the withholding of the principal. So if the will directs the interest or income to be applied to the maintenance or education of the legatee in the mean time as his ex-

(*l*) *Monkhouse v. Holme*, 1 Bro. C. R. 297. *Attorney-General v. Crispin*, 1 Bro. C. R. 386. *Benyon v. Maddison*, 2 Bro. C. R. 75. *Roe-buck v. Dean*, 4 Bro. C. R. 404. *Waddy v. North*, 3 Ves. J. 364. *Corbyn v. French*, 4 Ves. J. 433. *Bolger v. Machell*, 5 Ves. J. 513. *Blamire v. Gildant*, 16 Ves. J. 314. *Sturgess v. Pearson*, 4 Madd. 411. *Walker v. Main*, 1 Jac. and Walk. 1.

(*m*) *Bolger v. Machell*, 5 Ves. J. 509. *Atkins v. Hancocks*, 1 Atk. 500.

(*n*) *Elton v. Elton*, 3 Atk. 504.

(*o*) *Fonnereau v. Fonnereau*, 1 Ves. 119. *Heath v. Heath*, 2 Bro.

cutors shall think fit. (*p*) So also where the bequest was to A. when he should attain 21, and the will contained the appointment of a trustee for him during his minority, the subject was held to vest immediately upon the testator's decease. (*q*)

But if a less sum than the whole interest or income is directed to be applied to the maintenance of the legatee, the principal is not by that circumstance alone made to vest. (*r*) Nor will a general direction to provide for the maintenance of the legatee be sufficient for that effect. (*s*) Nor, as it has been said, the intermediate gift of the dividends of stock. (*t*)

Sometimes the intention as to the vesting has been gathered from the general import, though not in conformity with the literal expression. As where a testator bequeathed equal sums to each of his two grand-daughters for life, and to their children respectively: but if either of his two grand-daughters should die without issue, her share to go to the children of the survivor. One of the grand-daughters died leaving children, and afterwards the other grand-daughter, without issue, and the children of the grand-daughter dying first were held entitled. (*u*)

A legacy to the children of A. to be divided among them on their respectively attaining 21, vests in such children as they respectively come into existence: but when the eldest attains 21, at which period the fund is ascertained, the after-born children are excluded. (*x*)

C. R. 3. *Lane v. Goudge*, 9 Ves. J. 230.; and see *Dodson v. Kay*, 3 Bro. C. R. 409.

(*p*) *Fonnereau v. Fonnereau*, 3 Atk. 645.

(*q*) *Branstrom v. Wilkinson*, 7 Ves. J. 421.

(*r*) *Pulsford v. Hunter*, 3 Bro. C. R. 416. *Leake v. Robinson*, 2 Meriv. 387.

(*s*) *Chester v. Painter*, 3 P. Wms. 336.

(*t*) *Batsford v. Kebbell*, 3 Ves. J. 363.

(*u*) *Harman v. Dickinson*, 4 Bro. C. R. 90. *Sturgess v. Pearson*, 4 Madd. 411.

(*x*) *Gilman v. Severn*, 1 Bro. C. R. 582.; and see *Walker v. Shore*, 15 Ves. J. 123.

And where there was a bequest to trustees on trust to apply the interest towards the education of the children of A., till such children should attain 21, or be married with consent of guardians, and on trust to pay the principal and interest, or so much as should not have been applied towards education, to and amongst the said child or children of A., when and as they should respectively attain the age of 21, or be married with consent, it was held that the shares vested when the first child attained twenty-one. (y)

If there is a bequest to A. for life, and after his death to his children, or to the children of B., the children of A. or B. as they come into existence, in the life-time of A. take vested interests; and so also, if there is a bequest to the children of A. to be divided amongst them equally at 21, or marriage, with benefit of survivorship, as soon as any child attains 21, or is married, the shares become vested.

Where the condition or contingency, becomes impossible.

If the payment of a legacy is directed to be made at a certain time, and then the same legacy is subjected to a condition on the non-performance of which it is declared to be revoked, if the period of payment first arrives, and afterwards the condition is broken, the benefit has become vested, and will be absolute in the legatee. Thus where a legacy was given to A. to be paid in twelve months after the testator's decease; but if A. should marry B., then the testator revoked the legacy, and gave the legatee a shilling; and after the testator had been dead 14 months, and not before, A. married B., the legacy was held to have vested in A. and not to be divested by the marriage; as the condition remained in force only during the suspension of the period appointed for the payment. (z)

If the contingency on which a legacy is limited over, from circumstances which have taken place, can never happen, the precedent interest may become vested and absolute. As where a legacy was bequeathed to two,

(y) *Whitbread v. Lord St. John*, 10 Ves. J. 152.

(z) *Osborn v. Brown*, 5 Ves. J. 529.

to survive in the event of either of the legatees dying under twenty-one, and one only attained the age of 21 and died, the moiety vested in the other, since it could not survive according to the intention of the testator. (a) So although the purpose for which a legacy is given never happens, it may nevertheless be vested in the legatee; as where a sum was bequeathed to A. to put him out apprentice, and A. died before he was so put out, the interest was held to have vested in him, and to be transmitted to his representatives. (b) And where interest was bequeathed to a mother for the maintenance of her child, with a limitation over on her death, although she never had any child, the benefit vested in her. (c)

It has been held that where the legacy is bequeathed only in words appointing the time of payment, as where a testator directs that a sum of money shall be paid to A. at twenty-one or marriage, the period of the vesting is coincident with the period of payment, and such a bequest remains in contingency until the time for its taking effect arrives. (d) Whether where the interest only of a sum of money is given to one for life, with a gift of the corpus or principal at the death of such person to another, the vesting in such ulterior donee is suspended, may be doubted: many of the authorities in principle bearing the other way. (e)

Where the legacy is given by words only expressing the time of payment.

(a) *Reeves v. Brymer*, 4 Ves. J. 699. *Gibbons v. Caunt*, *ib.*

(b) *Barton v. Cooke*, 5 Ves. J. 463.

(c) *Hammond v. Neame*, 1 Swanst. 35.

(d) *Seamer v. Bingham*, 2 Atk. 57. *Leake v. Robinson*, 2 Meriv. 387.

(e) See 2 Rep. on Leg. 266. *Blamire v. Gildart*, 16 Ves. J. 314. *Walker v. Maine*, 1 Jac. and Walk. 9. See *Batsford v. Kebbell*, 3 Ves. J. 363. where a distinction is taken between the effect of words giving the dividends of stock and the interest of money, by Lord Loughborough, which it is not easy to comprehend. See likewise in support of the doctrine, that the legacy, where the gift is contained in the direction for the payment, does not vest before the period of payment arrives, *Van v. Clarke*, 1 Atk. 512.

The Courts lean against construing terms and expressions which sound conditionally, as conditions precedent to suspend the vesting. Thus where a testator has given a legacy over in case the first legatee should die before he may receive it, the Court has construed the ulterior bequest as a gift over in case the first legatee should die in the testator's life-time. (*f*) But the words of the testator, if they explicitly and definitively declare his meaning, must prevail; it is in his power, if he pleases, to make that which would generally be regarded as mere mode and form, operate substantially, and as a condition precedent to his bequest. Thus a testator gave certain stock to his son at Malaga, but considering that he had not been heard of for a long time, and it was probable he might not be living, he declared that the legacy was given him on the express condition that he should not be entitled to the same unless he should personally claim it from his executor, or in a certain church-porch before two witnesses, and in case he should not return and so claim it, within the space of seven years, from his the said testator's death, then his will was that he should be presumed to be dead, and the legacy should sink into the residuum, and the son never returned to England but died at Malaga about six years after the death of the testator: Lord Eldon, C. held that the legacy was not due; as the testator plainly shewed his meaning to be that the demonstration of the fact of his son's being alive in the manner pointed out, was to precede his title to the legacy. (*g*)

Of conditions precedent and subsequent, and their distributions.

A condition precedent must necessarily be performed before the interest can become vested. Thus where a legacy was given to A. to be at her disposal, if she should marry with the consent of B. and C., and not otherwise, and she died at 13, unmarried; here as the condition became impossible by the event, the bequest failed. (*h*)

(*f*) *Hutchison v. Mannington*, 1 Ves. J. 366.

(*g*) *Tulk v. Houlditch*, 1 Ves. and B. 248.

(*h*) *Cray v. Ellis*, 2 P. Wms. 531. *Lowther v. Cavendish*, 3 Bro. P. C. 349. *Clarke v. Parker*, 19 Ves. J. 1.

And if a bequest is made to A. on marriage before 21, with the consent of B. with a bequest over in the event of A.'s marriage before 21, without such consent; if A. marry before 21 without such consent, and afterwards attain 21 so married, the condition being incapable of being performed, the legacy to A. must fail as in the last case. (i) In which respect a subsequent condition differs from a condition precedent; for if a subsequent condition be rendered impossible by the event, the legacy becomes absolute. Thus, where stock was bequeathed to trustees to pay the dividends to A. till certain lands should be exchanged between him and B., and then the capital was to be equally divided between them, and B. died before the time for making the exchange had expired, A. was held absolutely entitled to the legacy. (k)

If a legacy be given to A. on his marriage with the consent (l) of B., A.'s marriage with such consent is necessary to entitle him to such legacy. (l) And if a trustee refuses to declare his consent or dissent, where his consent is required, upon a bill filed in Chancery setting forth the facts, and the terms and particulars of the proposed marriage, that Court will refer it to a master to enquire into the propriety of the marriage, and to approve of a settlement. (m)

Conditions subsequent are often construed as *in terrorem*, or as cautionary and recommendatory only, unless there is a bequest over on non-compliance, which generally imposes a strict construction on the conditional terms of the prior gift. Thus, if a testator makes a

(i) *Scott v. Tyler*, 2 Bro. C. C. 487.

(k) *Lowther v. Cavendish*, 3 Bro. P. C. ed. Toml. 186.

(l) See *Scott v. Tyler*, 2 Bro. C. R. 431.

(m) *Goldsmid v. Goldsmid*, Coop. C. C. 325.

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(1) What shall constitute and operate as a consent may be learned from the following cases. *Pollock v. Croft*, 1 Meriv. 181. *Burton v. Humphreys*, Ambl. 256. *Dashwood v. Lord Bulkeley*, 10 Ves. J. 230. *Clarke v. Parker*, 19 Ves. J. 1.



bequest to his widow for her life, should she continue unmarried, the same is held not to be forfeited by her subsequent marriage, there being no bequest over. (*n*) But a gift over makes the condition imperative; and it seems that a special direction that the legacy shall on the nonperformance of the condition fall into the residue, is tantamount to an express limitation over: (*o*) but it is doubtful whether the general residuary clause has the same effect. (*p*)

If a condition subsequent is inconsistent with the nature of the gift to which it is annexed, it will be rejected; as where a testator gave to A. the dividends of certain stock for his life, and at his death the principal to his executors, administrators, and assigns, but if he should attempt to dispose of such stock, then to go over to another; the legacy was held to be absolute. (*q*) And where a condition of marriage is annexed to a bequest, if the legatee marry in the testator's life-time, (*r*) the legacy becomes absolute. (*s*) In the case of *Sir J. Robinson v. Comyns*, it was observed by Lord Chancellor Talbot that "there are not any technical words to distinguish conditions precedent and subsequent, but the same words may indifferently make either, according to the intent of the party who creates them." This point therefore must depend upon a fair construction of the context; and sometimes upon a conclusion deduced from all parts of the will, taken together. And whether the adverbs of time, as *when*, and *then*, or any other form of expression denoting time, create conditions precedent or subsequent, must depend also upon similar grounds of construction. (*t*)

(*n*) See *Marples v. Bainbridge*, 1 Madd. 590; and for other instances, see *Morris v. Burroughs*, 1 Atk. 404. and *Cleaver v. Spurling*, 2 P. Wms. 528.

(*o*) *Lloyd v. Branton*, 3 Meriv. 118.

(*p*) *Lloyd v. Branton*, 3 Meriv. 108. *Scott v. Tyller*, Dick. 723.

(*q*) *Bradley v. Peixoto*, 3 Ves. J. 324.

(*r*) *Crommelin v. Crommelin*, 3 Ves. J. 227. *Parnell v. Lyon*, 1 Ves. and B. 484.

(*s*) Cas. temp. Talb. 166.

(*t*) See Sheph. Touch. by Preston 117, n. 3.



Conditions subsequent leave the legacy to take effect as a vested interest in the mean time until forfeiture by non-performance, when the period for performance arrives. But unless the subject of the legacy or failure of performance is limited over, such conditions subsequent are usually continued *in terrorem*, only, as we have before mentioned. Where there is a gift over on non-performance, such ulterior interest assumes the character of a conditional limitation.

If, though the condition be *in terrorem*, yet if an additional bequest is given to the legatee on performance of the condition, such condition must be performed to entitle to such additional gift. (t) And if money to be raised out of land is directed on non-performance of a condition to be paid to the person entitled to the reversion, such direction is considered as equivalent to a conditional gift over, so as to make the performance indispensable. (u)

Where a condition is annexed to a legacy, the acceptance of the legacy is considered as an engagement to perform the condition, and as putting the legatee virtually under a contract; and such an acceptance may be implied from the acts of the party. As where the legatee receives interest on his legacy, such act amounts to an acceptance. (v)

We shall close this head with observing, that wherever a condition may be performed at any time, the legatee will have his whole life to perform it in. (w)

With respect to all interests arising out of land, the general rule is, without regard to the question, whether the land be the primary, or only the secondary and auxiliary fund—or whether the charge be made by deed or will—generally, or out of the rents and profits; (x) or whether it be a portion, or a general

Of legacies payable out of land.

(t) *Gillet v. Wray*, 1 P. Wms. 284.

(u) *Ashton v. Harvey*, 1 Atk. 371.

(v) *Earl of Northumberland v. Earl of Aylesbury*, Ambl. 544.

(w) *Gulliver v. Ashby*, 4 Burr. 1929.

(x) *Harrison v. Naylor*, 3 Bro. C. R. 109.

legacy—or for a child or a stranger—or with or without interest, in the mean time, (b) that charges upon land payable at a future day, shall not be raised where the party dies before the day of payment. This is the *general* rule: but there are many exceptions; as where the time of payment is postponed from the circumstances not of the person but of the fund. Thus where a legacy is charged on land, to be paid after the death of the testator's wife, there, if the legatee die after the death of the testator, and before the death of the wife, the legacy goes to the representatives of the legatee. (c) But wherever a legacy charged on real property is given expressly with a view to the wants and occasions of the legatee at a particular time, as where it is made payable at 21, or marriage, if the legatee die before the time at which, according to the intention of the testator, the legacy would be wanted, it sinks into the land. And where the fund is mixed, the vesting may depend upon the question whether it was necessary to resort to the personal estate. (d)

Where the legacy, or portion, is made payable out of land, and no time of payment is expressed, the determinations are difficult to be reconciled; some considering them as presently vested, and others that they do not vest, if the legatees die before they want them. (e) If the sum itself, which is to be paid at a future time, is uncertain, it cannot vest in the interim; (f) and wherever payment out of land is postponed till 21, though it may vest for some of the above-mentioned

(b) *Pearse v. Lowman*, 3 Ves. J. 138.

(c) *Tunstall v. Bracken*, 1 Bro. C. R. 124., note; and *Ambl.* 167. and see *Dawson v. Killett*, 1 Bro. C. R. 119.; and *Lowther v. Condon*, 2 Atk. 130. *Hodgson v. Rawson*, 1 Ves. 43. *Thompson v. Dow*, 1 Bro. C. R. 193 n. See also *Emes v. Hancock*, 2 Atk. 507. *Embrey v. Martin*, *Ambl.* 230. *Manning v. Herbert*, *Ib.* 575.

(d) 1 Ves. J. 48. See the note to the case of the Duke of Chandos *v. Talbot*, 2 P. Wms. 612.; and 1 Atk. 485. 3 Atk. 318.

(e) See *Tunstall v. Bracken*, *Ambl.* 167. 2 Eq. C. Abr. 248. Ch. Ca. 181. *Prec. in Ch.* 318. 3 Atk. 645.; and see *Rivers v. Earl of Derby*, 2 Vern. 72.

(f) *Maddison v. Andrew*, 1 Ves. 57.

reasons, yet the representative cannot claim it, until the party, had he lived, would have attained that age. (i)

To prevent a lapse of a legacy, a will should be especially penned, (k) and the intention made perfectly clear. Where testatrix forgave a debt, and desired her executors to deliver up the bond to the debtor, it was held that it did not lapse by his death before testatrix. (l) It is said, too, that if a debt is bequeathed to a debtor, with an express release, the legacy will not lapse by the death of the debtor, in the testator's life-time; but that it is otherwise if no words of release are added. (m) And if a testator expressly directs that his legacies shall not lapse by the deaths of the legatees in his life-time, and then gives a legacy to B., his executors and administrators, the legacy will not lapse, though B. die in the testator's life. (n) But where a bequest was to A. at 21, and in case of his death under 21, to A.'s children, and A. having attained 21 died in the testator's life-time, the legacy was held to have lapsed, because a will speaks only from a testator's death; and had A. survived the testator, he would have been absolutely entitled, for it was impossible for the event on which the legacy was given over to have happened. (o) Where a legacy is given in consideration of paying an annuity, and the legatee dies in the testator's life-time, the annuity shall be a charge on the residuum, though the legacy lapsed. (p) But a bequest to A. on condition she gave part to her children, lapsed by the death of the legatee in the testator's life-time. (q)

If a legacy be given to A. for life, and after his death

(i) 2 Vern. 199. 2 Ventr. 342.

(k) Sibley v. Cooke, 3 Atk. 579. Sibthorpe v. Moxom, Ib. 582.

(l) Elliot v. Davenport, 1 P. Wms. 83. Sibthorpe v. Moxom, 1 Ves. 50.

(m) 2 Vern. 522.

(n) 3 Atk. 572.

(o) Doe v. Brabant, 3 Bro. C. R. 393, and see Humberstone v. Stanton, 1 Ves. and B. 385. See also Berkhead v. Coward, 2 Vern. 116.

(p) Oke v. Heath, 1 Ves. J. 141.

(q) Berkhead v. Coward, 2 Vern. 116.

to B., and in case of B.'s death, to B.'s representatives, the legacy lapses with respect to B. and his representatives, by his death in the testator's life-time. (r)

Testator gave a sum of money to A. for life, and after her death to be divided amongst all her children, living at her decease; A. died in the testator's life-time, leaving children, and one of them also died in the life-time of the testator: and it was held that the share of the child so dying lapsed. (s)

A legacy to A., to be paid at the end of a year after the testator's death, lapses by the death of A. in the life-time of the testator. (t)

If a particular legacy lapses, it falls into the residue: but if a part of the residue lapses by the death of one of the residuary legatees in the testator's life-time, it belongs to the next of kin of the testator. (u)

If a legacy is given to A. and on his not performing a certain condition, to B., and A. dies in testator's life-time, without performing the condition, the bequest over may take effect. (v) But if the first legatee fulfils the condition, the bequest over entirely fails, and the legacy lapses *in toto*. (w)

Of abatement  
of legacies.

Where there is not enough to pay both the debts and legacies, the legacies must be reduced proportionably. In case of a deficiency, charity legacies must abate in proportion, and so must legacies given to executors for their trouble. A legacy to build a monument to the parent of the testator, being a debt of piety, and small gifts to the poor of a parish being considered as doles and part of the funeral, have been held exempt from this liability.

No preference is allowed to servants, (x) or to an-

(r) *Corbyn v. French*, 4 Ves. J. 418.

(s) *Allen v. Callow*, 3 Ves. J. 289.

(t) *Tidwell v. Ariel*, 3 M add. 403.

(u) *Bagwell v. Dry*, 1 P. Wms. 700.

(v) *Miller v. Warren*, 2 Vern. 207. *Ledsome v. Hickman*, 2 Vern. 611.

(w) *Calthorpe v. Gough*, 3 Bro. C. R. 395.

(x) *Attorney General v. Robins*, 2 P. Wms. 25.

nuitants: (*y*) but a legacy to a wife unprovided for or in satisfaction of dower, is not liable to abate. (*z*)

Specific legacies do not abate with the pecuniary legacies: but if the debts require more than the sacrifice of the pecuniary legacies, they abate inter se, and neither specified nor general legatees can be called on to abate by the residuary legatee.

If one make a will, and then a codicil, and give legacies by both, on a deficiency they shall all come into average: but a priority may be given by charging a particular fund. (*a*) And if one gives legacies, and apprehending there will be a surplus, gives further legacies out of the surplus by his will or codicil, the legacies first given shall have the preference. (*b*)

Though a testator may by express terms give a priority, yet the law leans strongly in favour of equality in the abatement of legacies, and will not suffer it to be disturbed by doubtful expressions. Thus “*imprimis*,” or “*in the first place*,” or, “*in the first place to A. and then to B.*,” or, “*to A. payable at one month, to B. at six months, and to C. at twelve months*,” will give no preference as to the liability to abate. (*c*)

If a legacy be made payable on a certain day, and nothing is expressed about interest, it is a general rule that the interest shall commence only from the time it is payable, (*d*) though the legacy may vest from the death of the testator, so as to be transmissible to the legatee’s representatives, in case he dies before it is payable. (*e*) If the legatee die before the time of payment, as, if it be made payable to the legatee at twenty-one, and he die before twenty-one, his representative

Of interest upon legacies.

When it commences.

(*y*) *Barton v. Cooke*, 5 Ves. J. 464.

(*z*) *Lewin v. Lewin*, 2 Ves. J. 415.

(*a*) *Acton v. Acton*, 1 Meriv. 178.

(*b*) *Attorney General v. Robins*, 2 P. Wms. 23.

(*c*) *Lewin v. Lewin*, 2 Ves. 415. *Beeston v. Booth*, 4 Madd. 161.

(*d*) *Palmer v. Mason*, 1 Atk. 505. *Heath v. Perry*, 3 Atkins, 101. *Crickett v. Dolby*, *Amber v. Tomkins*, 1 Cox C. C. 137.

(*e*) 2 P. Wms. 481. notes. 3 Vez. J. 10. 4 Vez. J. 1. *Ellis v. Ellis*, 1 Sch. and Lef. 12. 2 Ib. 444. *Taylor v. Hibbert*, 1 Jac. and Walk. 308.

must wait till he would have attained twenty-one if he had lived, unless it were directed by the will to be paid with interest. (f) Where no time is appointed for the payment of a legacy, it is not necessarily payable till the expiration of a year after the testator's death, that being the time allowed the executor for getting in the effects: and therefore, in such a case, interest does not begin to be payable till the year is expired. (g) And though the will directs that the legacy shall be paid "as soon as possible," interest upon it will only be due from the end of the year from the testator's death. The old doctrine that the payment of interest should depend upon the funds' being productive or barren is exploded; and now, although the testator's property consists of stock producing a certain and regular interest, yet if the will is silent about interest, none will arise upon a legacy given by him till the end of the year after his death. (i)

This general rule of giving interest to the legatee, from the expiration of the year, is not to be extended or contracted upon slight inferences of intention; nor will it yield to the impossibility of getting in the personal estate, so as to pay the legacy within the year allowed for that purpose. (k) And if a legacy is charged on a reversion, it carries interest from the end of the year, that being considered a sufficient time for the sale. (l)

If the legacy is to come out of an estate, devised for that purpose, interest will be due from the testator's death; and although it may happen that such estate, so charged, may not be recovered for a considerable time after that period, and the testator directs the legacy to be paid, when the money, which is to constitute it, can be recovered; still the payment of interest, if practicable, or at least the computation of it, will commence

(f) 4 Vez. J. 345.

(g) 2 P. Wms. 26, 27. *Webster v. Hall*, 8 Ves. J. 415.

(i) 7 Ves. J. 97.

(k) *Bourke v. Ricketts*, 10 Ves. J. 334.

(l) *Maxwell v. Wittenhall*, 2 P. Wms. 26.

from the testator's decease. The judgment of Sir W. Grant, in the case of *Wood v. Penoyre*, (*m*) exhibits the law on this subject with so much clearness, that the reader will not be sorry to find it stated in this place.

Thomas Tolson by his will, dated the 9th of May, 1788, after payment of his debts, gave to the defendants Penoyre and Rood the sum of 6000*l.* secured to him with interest at 5*l.* per cent upon a mortgage of the estate of Sir Lucius O'Brien, in the county of Clare in Ireland, and all his legal and equitable interest in the said mortgage; upon trust to carry on the suits depending in Ireland for recovering the said money, in case it should not have been paid in the testator's life; and to pay and apply the said money, when recovered, in the manner hereinafter mentioned. The testator afterwards gave the following, among several other legacies:

“Also, I give to my said trustees the sum of 2500*l.*  
“to be paid within six months next after my decease;  
“and also the further sum of 2500*l.* to be paid out of  
“the money due on the Irish mortgage when the same  
“shall be recovered;” upon trust to place out the said two sums upon government or other good securities, and pay the interest or dividends to the testator's niece Elizabeth Holland for life, for her separate use; and after her decease to divide the trust-money among her younger children equally.

“Also, I give and bequeath the several legacies to  
“the several persons hereinafter mentioned, (that is to  
“say,) to my niece Elizabeth Wood, the sum of 100*l.*  
“and to each of her four children 100*l.* to be paid as  
“soon as may be after my decease; and also to each of  
“her said children the further sum of 900*l.* to be paid  
“out of the money due on the Irish mortgage when the  
“same shall be recovered.”

A great number of legacies followed; and then this clause; “and I direct that the legacies hereinbefore  
“given to my servants, and all other legacies not ex-

(*m*) 13 Ves. J. 325.



“ceeding 100*l.* each shall be paid immediately after my  
 “decease ; and the other legacies, with those given  
 “to charitable uses, within six months next after my  
 “decease.”

Sir W. Grant, M. R., after observing that his first impression upon this case was, that the words “when the same shall be recovered” had the effect of postponing the time of payment, and consequently the right to interest, until the mortgage debt, out of which the legatees were payable, should have been actually received and got in, declared that upon farther consideration of the cases, applicable to the subject, he was satisfied that the words ought to receive a different construction.

Wherever legacies, (continued the same learned judge,) are given out of personal estate, consisting of outstanding securities, those legacies cannot be actually paid, until the money due upon such securities is actually got in : but, by a rule that has been adopted for the sake of general convenience, this court holds the personal estate to be reduced into possession within a year after the death of the testator. Upon that ground interest is payable upon legacies from that time, unless some other period is fixed by the will. Payment may in many instances be actually impracticable within that time : yet in legal contemplation the right to payment exists, and carries with it the right to interest until actual payment. In the cases of *Entwistle v. Markland*, and *Sitwell v. Bernard*, (*b*) it was determined that the reference by the testator to the time at which his personal estate should be got in does not, without the most plain and distinct indication of his intention, affect the legal presumption, that the personal estate may be got in within a year from the testator’s death. In both those cases all that the plaintiff was entitled to, according to the strict letter of the will, was to have an estate for life in such lands as should be purchased with the produce of the personal estate, when it should be received and got in. It was admitted on all sides in

(*b*) 6 Ves. J. 520. and notes to the case.



both those cases, that there were large portions of the personal estate that could not by any diligence of the executors have been possibly reduced into possession within a year from the death of the testator ; and yet it was held, that the whole, for the purpose of the question then before the Court, was to be considered as having been reduced into possession at the end of the year from the testator's death, so as to entitle the tenant for life to interest upon the whole fund ; as if it had been actually realized, and actually capable of being laid out in land.

These cases shew, that the actual delay of payment is not necessary, in order to found the claim of interest. If the executors in either of those cases had been called upon by the tenant for life to purchase an estate, in order that he might enter into the enjoyment and the receipt of the rents and profits, they would have had just the same answer to give, which the executors and trustees in this case say they would have given, if they had been called upon to pay, before the money, due upon the mortgage was received : for they would have said in those cases respectively, it was impossible for them to purchase land ; for they could not with due diligence have got in the personal estate, with which that land was to be purchased. So, the executors in this case say, the legatees could not have had their legacies, if a bill had been filed ; as the mortgage out of which they were payable was not received. But it was held that the possibility of purchasing, in fact, does not determine the question, whether, according to the legal presumption, the purchase might not have been made. So the possibility in this case does not determine, whether by legal presumption the mortgage might not have been called in within a year. I cannot, without rejecting the authority of those cases, hold, that the mortgage, though not actually capable of being called in, is not to be considered as having been got in within the year. Constructive receipt is held equivalent to actual receipt for the purchase of the

right to interest. There is no doubt a testator may exclude the rule of the Court, by plainly indicating an intention inconsistent with it; and in *Gaskell v. Harman*, (a) and *Elwin v. Elwin*, (b) it did seem to me, that the anxiously marked intention would have been completely disappointed, if in one of those cases I had taken the personal estate to have been received or ascertained; or, in the other, if I had held the real estate to have been sold, at any other period than that at which those events respectively took place in fact. But in *Entwistle v. Markland*, and *Sitwell v. Bernard*, the Court seems to have decided, that such words as "when received," "when got in," "when recovered," "when laid out," do not so clearly mark the intention as to preclude the application of the legal presumption. His Honour then stated the case of *Hambling v. Lyster*, from the register's book, reported, but not fully, in *Ambler*, which established the same principle. (c) From the register's book he found that the executors in their answer stated, that they had laid a case before Mr. Wilbraham upon two questions: 1st, whether the receipt of the money, due upon the mortgage, by the testator himself, was an ademption of the legacies given out of it: 2dly, supposing those legacies not adeemed, whether the legatees had a lien upon the new securities, in which the money received upon the mortgage had been laid out. Mr. Wilbraham's opinion was, that there was no ademption; but likewise, that the legatees had no right to follow the money laid out in the new securities. That was a material point; as it appeared the estate was not sufficient for all the legacies. One question therefore was, whether those legatees were to abate with the general legatees, or were to be paid by preference out of the securities upon which the money, that had been received by the testator, had been laid out. The Master of the Rolls agreed with

(a) 6 Ves. J. 159. 11 Ves. J. 489.

(b) 8 Ves. J. 547.

(c) Amb. 401.

Mr. Wilbraham upon the first point : but differed from him upon the second ; for the decree says, that so much of the money, so compounded for, and received and placed out again by the testator, is still to be considered as a fund for the satisfaction of the plaintiff's legacies and as the money, due upon two bonds specified, was the readiest for the plaintiff's satisfaction, that money was directed to be called in forthwith, and payment was decreed with interest from the end of one year after the testator's death, and costs were given out of the money so received ; and, if the said money should not be got in, or should not be sufficient for the plaintiff's satisfaction, liberty was given to apply.

In consequence of Mr. Wilbraham's opinion, an apportionment had been made of the whole estate ; and 32*l.* had been apportioned to the plaintiff for his legacy of 100*l.* He refused to accept that ; and was held entitled to satisfaction out of the specific security. Then, as the new securities were held to be substituted for the former, it is clear, all the words of the will must have been as applicable to the one as to the other ; and the legatee could have no claim upon the one set of securities except in the same mode as he had a claim upon the other ; that is,—to be paid out of the securities, when the money due upon them should be received ; and the decree accordingly follows the words of the will “ when received.” But that did not prevent interest running from the death several years before it was received.

Sir William Grant was therefore of opinion, that the words “ when received ” did not suspend or postpone the right to interest : but, that the legatees in the case before him would be entitled to interest at the rate of 4 per cent. from the death of the testator.

If a legacy be payable at a future time, it bears interest only from that time, although given in terms to ~~make~~ it vest *instantly* : This is the rule : but it is subject to certain exceptions. Thus where the legatee is the child of the testator, not otherwise provided for, the

In favour of a child interest will commence at the death.

Who is a child within this privilege.

Court will order interest to commence immediately, although the legacy is payable at a future day ; (d) or even on a contingent event ; (e) since a parent is bound by the law of nature to provide a present maintenance for his own child ; (f) and it seems it was Lord Alvanley's opinion, when Master of the Rolls, that illegitimate children were to be admitted to the same benefit ; (g) though Lord Hardwicke held a contrary opinion, on the principle of law, which recognizes no relationship in such a child. (h) And Lord Eldon seemed to think that there ought to be something to shew that the testator means to put himself *in loco parentis*. (i) Lord Alvanley was also of opinion that a grandchild was to be comprised within the exception out of the above-mentioned general rule, and was to be put upon the same footing with a child in this respect ; (k) and the Court of Chancery has in a subsequent case confirmed that opinion. (l) But the prevailing doctrine appears to be that interest from the death is a favour not to be granted to grandchildren, or illegitimate children, as such, unless the legacy be given by a person standing *in loco parentis* ; (m) and never but in the case of infants. (n).

Where interest goes to the representative, and where not.

Where no direction is given as to the growing interest, profits, or proceeds of a particular legacy, made payable at a future time, the interest lapses into the residue. But it seems otherwise, where the bequest is of the whole personal estate, or of the residue, in which case the interest follows the capital.

(d) *Raven v. Waite*, 1 Swanst. 557. (e) *Heath v. Perry*, 3 Atk. 102.

(f) *Harvey v. Harvey*, 2 P. Wms. 21. 3 Ves. J. 13. 3 Atk. 60, 102.

(g) 3 Ves. J. 12.

(h) 1 Ves. 310.

(i) 6 Ves. J. *Perry v. Whitehead* ; and see 4 Ves. J. *De Mazar v. Pybus*.

(k) 3 Ves. J. 12.

(l) 5 Ves. J. 194.

(m) *Lomax v. Lomax*, 11 Ves. J. 481. *Errington v. Errington*, 12 Ves. J. 20. *Hill v. Hill*, 3 Ves. and B. 183.

(n) *Lounder v. Lounder*, 15 Ves. J. 301.

If a residue is given, to be paid at 21 with a disposition over in case of death before 21, and such death happens, the interest goes to the infant's representatives: but if it is bequeathed so as to vest on a contingent event, and the contingency never happens, the intermediate interest accumulates, and goes with the residue. (o)

Where a father is living and able to maintain his child to whom a legacy with interest is given, the interest of such legacy shall not be applied to his maintenance during his non-age; but where the father, in such a case, is incapable from poverty, the Court will allow maintenance to the child out of the interest of his legacy. (q)

When the occasion is very pressing, the Court will sometimes break in upon the principal: but this is seldom and cautiously done; (r) and it seems this can on no account be done, if the legacy be devised over on the infant's dying before he comes of age. (s) Whether legacies are charged on real or personal estate, it is become the established practice of the Court to allow only 4 per cent, where no interest is directed by the will; (t) although the fund may produce more. (u)

If an annuity be given by a will without specification as to the times of payment, it shall commence in computation from the testator's death, and consequently the first payment shall be made at the expiration of the year after that event: but if a sum be directed to be placed out to produce an annuity, whether that is to be considered as a legacy payable at the end of the year, and to begin in computation only from that time, or as an annuity commencing from the testator's death, seems

(o) See the note to *Heath v. Perry*, 3 Atk. 102. and *Ellis v. Ellis*, 1 Sch. and Lef. 1. See also *Leake v. Robinson*, 2 Meriv. 384.

(q) 3 Atk. 60. 2 P. Wms. 21., and see *Ellis v. Ellis*, 1 Sch. and Lef. 1. and note. See also 3 Ves. J. 16. as to the wife in such cases.

(r) 4 Bac. Abr. 433. 3 Bro. C. R. 178. 2 P. Wms. 21. 1 Vern. 255.

(s) 4 Bac. Abr. 442. (t) *Sitwell v. Bernard*, 6 Ves. J. 520.

(u) 4 Bac. Abr. 440. 2 Bro. C. R. 47. 3 Bro. C. R. 53.; and see *Sitwell v. Bernard*, 6 Ves. J. 520.

not to be fully settled. (x) Nor is it clear from the authorities when interest is allowable for the arrears. (y)

Wherever a legacy is considered as going in satisfaction of a debt, interest is payable upon it from the death of the testator. (a)

Where the legacy is to an infant, how to be paid.

An executor used often to be embarrassed how to dispose of a legacy bequeathed to a minor. He runs a risk in paying it to the father, or any other relation of the infant, without the sanction of a Court of equity. (b) But by the act of 36 Geo. 3. c. 52. s. 32. it is enacted, that where, by reason of the infancy of any legatee, the executor cannot pay the legacy, it shall be lawful for him to pay such legacy, after deducting the duty payable thereon, into the bank of England, with the privity of the accountant-general of the Court of Chancery, to be placed to the account of the legatee, for payment of which the accountant-general shall give his certificate, on the production of the certificate of the commissioners of stamps that the duty thereon has been duly paid; and such payment into the bank shall be a sufficient discharge for such legacy; and when paid it shall be laid out by the accountant-general in the purchase of 3 per cent. consolidated annuities; which, with the dividends thereon, shall be transferred or paid to the person entitled thereto, or otherwise applied for his benefit, on application to the Court of Chancery by petition, or motion, in a summary way. But the executor has time to make such payment into the bank till the expiration of a year after the testator's death.

Legacy to be paid in the currency of the country where testator resided.

We shall conclude this part of our subject with observing that a legacy is to be paid in the currency of the country where the testator was resident at the time of

(x) *Gibson v. Bott*, 7 Ves. J. 96.

(y) *Litton v. Litton*, 1 P. Wms. 543. *Batten v. Earnley*, 2 P. Wms. 163. *Cruise v. Hunter*, 2 Ves. J. 169.

(z) *Clark v. Sewell*, 3 Atk. 99.

(a) 4 Bac. Abr. 429. 1 Eq. C. Abr. 300. 3 Bro. C. R. 96, 186. *Barn. Eccl. L.* 321.

making his will. (b) It is not material in this respect where the legatee resides. (c) And the same rule prevails, though the testator may have some effects in this country, unless he charges the legacy on his English property. (d)

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SECT. III.

*Of Distribution by an Administrator.*

AS far as regards the collection of the effects, and the payment of the debts of the deceased, the office of the administrator corresponds with that of the executor. And if there be a will without the appointment of an executor, then the administrator with the will annexed, of whom mention has before been made, is in the place of an executor, and has the same duty to perform in respect to the legatees. But for the duties of an administrator, appointed by the ordinary, in respect to the surplus property of an intestate, after the funeral and testamentary charges and debts are discharged, we must look to the several positive provisions of the Legislature, by which the distribution thereof has been directed and regulated.

The distribution, according to the statute, should be in the manner following: One third part to the wife of the intestate, and all the residue by equal portions among his children, and such persons as legally represent such children, in case any of them be then dead, other than such child, or children (not being heir at law,) as shall have any estate by the settlement of the intestate, or shall have been advanced by him in his life-time, by portion, equal to the share, which shall by such distribution be allotted to the other children, to whom such distribution is to be made; and in case any child (other than the heir at law,) shall have any estate,

Distribution  
under the sta-  
tute.

(b) *Houlditch v. Mista*, 1 P. Wms. 696. 2 P. Wms. 88, 89.  
*Cockerell v. Barber*, 16 Ves. J. 461.

(c) *Saunders v. Drake*, 2 Atk. 466.

(d) *Pearson v. Garnet*, 2 Bro. C. C. 47.



by settlement from the intestate, or shall have been advanced by him in his life-time by portion, not equal to the share which will be due to the other children by the distribution ; then so much of the surplusage shall be distributed to such child as shall have any land by settlement from the intestate, or was advanced in the life-time of the intestate, as shall make the estate to be equal, as near as can be estimated ; but the heir at law notwithstanding any land that he shall have by descent, or otherwise, from the intestate, is to have an equal part in the distribution, with the rest of the children, without any consideration of the value of such land. But in case there shall be no children, nor any legal representatives of them, one *moiety* of the estate shall be allotted to the wife of the intestate ; and the residue of the same shall be distributed equally among every of his next of kindred, who are in equal degree, and those who legally represent them.

No representations shall be admitted among collaterals, after brothers' and sisters' children : and if there be no wife, then all the estate shall be distributed equally among the children ; and if no child, then among the next of kindred to the intestate, in equal degree, and their legal representatives. For the benefit of creditors, no such distribution of the goods of an intestate shall be made, till after the expiration of one year from his death. And every one, to whom any distribution and share shall be allotted, shall give bond, with sufficient sureties, in the spiritual Court, that if any debt, truly owing by the intestate, shall be afterwards sued for and recovered, or otherwise duly made to appear, that then, and in every such case, he shall refund, and pay back to the administrator, his rateable part of that debt, and of the costs of suit, and charges of the administrator, by reason of such debt, out of the part and share so allotted to him, thereby to enable the administrator to pay and satisfy the debt so discovered after the distribution made.

The statute contains exceptions expressly saving the customs of the city of London, and the province of York.



Posthumous children are equally entitled with those born in the life-time of the intestate. And no difference is made between the half and the whole blood; they are equally entitled, as being of equal propinquity to the deceased; and if there be but one child and a widow left by the intestate, the widow takes her third, and the other two thirds will go to the child; and if no widow, then the one child will take the whole. If all the children be dead, the children which they or any of them may have left will take equal shares, as next of kin, in their own right, and not by way of representation. But if some of the children be living, and others dead, leaving children, the children of the deceased child take the share of their respective parents, by representation, and not in their own right. Thus, if A. have three sons, B., C., and D., and B. die, leaving four children, and C. die, leaving two children, on the death of A. intestate, one-third will go to D. another third to the four children of B., and the remaining third to the two children of C.

Posthumous children, and those of the half blood, equally entitled.

It is plain, under this statute, that a younger child cannot take any benefit of the distribution, unless he first bring into the general mass of the testator's property whatever estate in land or pecuniary portion he has received from the intestate, in his life-time, by way of advancement, by settlement, or otherwise; and this is called bringing the same into hotchpot, from which obligation, however, the heir at law is specially exempted. The advancement of a child so brought into hotchpot is for the benefit of the children only, exclusively of the widow. (c) And it is to be observed, that if a child, after receiving such advancement, shall die in his father's life-time, the representative title of the grandchildren cannot be enforced, unless they first bring in the advancement of their parent. (d) Though the heir at law shall not account for the land, which came to him by descent, or otherwise, from the intes-

Of advancement and bringing into hotchpot.

Of the privilege of the heir in this respect.

(c) *Prec. in Chan.* 182.

(d) *2 P. Wms.* 560.

tate ; (1) yet any advancement out of the personal estate must be brought in by him, as well as the other children, before he can be entitled to a distribution, under the statute ; (e) and the same obligation extends to coheiresses. (f)

Every species of substantial provision is within the meaning of advancement under the statute, as the purchase of an advowson, or any office or commission, (g) the settlement or gift of a marriage portion, lands or interests in lands, (h) annuities, reversions, and gifts *in futuro*, (i) or on contingency, (k) (such being capable of a valuation,) and even provisions which are not to take place in the father's lifetime. (l)

The advancement must be by an act in the lifetime, complete as to the property, though it may not take effect, or be intended to take effect, till after the death of the intestate. A provision therefore by will where a testator dies intestate, as to part of his personal estate, is not considered an advancement with respect to that part. (m) Neither is land given by the father's will (n) to a younger child, or what a child derives under his mother, (o) to be considered as an advancement within the meaning of the statute.

It is scarcely necessary to say that property given to a child by any other than his parent, or what he shall acquire for himself, does not come under the description of advancement. Lands descended to the heir in Borough English are privileged from being brought into hotchpot ; for the statute speaks only

(e) Fitzg. 285.

(f) 2 P. Wms. 240.

(g) 3 P. Wms. 317. note (o)

(h) 2 P. Wms. 441.

(i) 2 P. Wms. 445.

(k) 2 P. Wms. 442.

(l) 2 P. Wms. 440.

(m) 2 P. Wms. 240.

(n) Id. *ibid.*

(o) 2 P. Wms. 356.

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(1) The bequest of a shilling to an eldest son, in satisfaction of all claims, was decreed sufficient to exclude him from his distributive share of the testator's personal estate not disposed of. *Acherley v. Vernon*, 10 Mod. 524.

of such estate as a child has by settlement, or by advancement from the intestate in his lifetime. (p)

The title to take as next of kin under the statute is to be traced by the same rules of consanguinity as the title to administration. In case, therefore, of no children, nor any issue of children, the father becomes entitled to all the surplus in exclusion of the brothers and sisters of the deceased: but the *mother*, by the statute 1 Jac. 2. c. 17. s. 7. comes in only with the brothers and sisters, each of them being entitled to an equal share with her. If, therefore, the intestate have left a widow, a mother, and brothers and sisters, the widow is entitled to a moiety, and the residue is equally shared between *the mother* and the brothers and sisters of the deceased; and in case any deceased brother or sister have left children, such issue will take the share their parent would have been entitled to if living. But representation, under the statute of Distributions, is restricted among collaterals to the children of the brothers and sisters of *the intestate*. It has, therefore, been held, that if an intestate leave an uncle and the child of a deceased aunt, the sister of the uncle, such child shall have no distributive share with the uncle. (q)

Of the title of the father and mother of the intestate.

Grandfathers and grandmothers, though in equal degree of consanguinity with brothers and sisters, shall have no share with them in the distribution, (r) but come next in order; and next to them are the uncles and nephews, aunts and nieces, who are all in equal degree, and take *per capita*: and it is to be observed, that dignity of blood makes no difference in these titles; so that where the next of kindred are a grandfather or grandmother by the father's side, and grandfather or grandmother by the mother's side, their claims are equally respected. (s)

Grandfathers and grandmothers, uncles, aunts, nephews, and nieces.

The statute suspends the distribution till a year after the death of the intestate: but this is no suspension of

Of the vesting of the distributive share.

(p) Cas. temp. Talbot, 276.

(r) Amb. 191.

(q) 1 P. Wms. 594.

(s) 1 P. Wms. 53.

Where a bastard dies intestate.

the vesting in the next of kin, who have survived the intestate, so that if any such die before the year, their representatives are entitled to their distributive shares. (t)

As a bastard can have no kindred, his effects, on his dying without a will, belong to the king, who, on proper application, usually grants them by letters patent to the nearest natural connection; upon the strength of which such persons obtain, as of course, a grant of administration from the Ecclesiastical Court, which entitles him to the sole enjoyment of the personal property. (u)

The distribution of an intestate's effects is regulated by the law of that country which may be properly called his home or domicile: but the actual place where he happens to be at the time of his death, though presumptively his domicile, may, by circumstances, be shewn not to be so; for an occasional or temporary residence will not constitute such domicile so as to subject his property to the local laws with respect to its distribution. (x)

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#### SECT. IV.

##### *Of Distribution by the Custom of London.*

THE restraints which these customs formerly imposed upon the *testamentary power* have been removed by several statutes; yet, as to the property of an intestate they remain in full operation. If a freeman of the city of London die, (and it is of no consequence where, or whether he resided or left any property within the city,) leaving a widow and children, (although such children were not born in the city,) his personal property, after deducting the widow's apparel and the furniture of her bed-chamber, (1) which is called the

(t) 3 Bac. Abr. 75.

(u) Doug. 542.

(x) Amb. 25, 415, 416. 2 Ves. J. 198.

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(1) If the intestate's property exceed 2000*l.* it is said the widow is entitled to 50*l.*

widow's chamber, is divided into three parts, one of which belongs to the widow, another to the children, and the third to the administrator, *in that character*. If there is only a widow, or only children, they respectively take one moiety, and the administrator the other (a); if neither widow nor children, the administrator takes the whole. (b) That which belongs to the administrator is called the dead man's part, because formerly it was to be expended in masses for the soul of the deceased: but by the stat. 1 Jac. 2. c. 17. the administrator's part has been made subject to be distributed, as in the common cases. The custom has nothing to do with the next of kin: but is confined to the wife and children of the intestate, not even extending to his grandchildren. (c) And a posthumous child takes together with the other children. (d) If therefore a free-man die, leaving a widow and grandchildren only, the widow takes her half by the custom; and the other half is to be distributed under the statute, in the proportion of one-third to the widow, and two-thirds to the grandchildren, as the lineal representatives of the deceased children. And if there be nobody within the purview of the custom, as if there be neither wife nor child, the whole will be distributed under the statute.

Of the dead man's part.

The privilege of the widow's chamber, like the right to paraphernalia, is postponed to the rights of creditors. And a woman may be deprived of all these rights, whether under the custom or under the statute, by an express exclusion in her marriage settlement; (e) or by a divorce in the Ecclesiastical Court for adultery. (f) The share of a child, where the intestate has left other children under the custom, *does not vest*, until the age of 21; so that he cannot dispose of it by will until that age; and if after that age he dies intestate, it goes according to the statute. If he die under that age, his share survives to

Of the widow's chamber.

Of the vesting under the custom.

(a) 1 P. Wms. 340.

(b) 2 Show. 175.

(c) 1 P. Wms. 541.

(d) Prec. in Ch. 499.

(e) 1 Eq. C. Ab. 163, 1 P. Wms. 531.

(f) Bunb. 16.

the other children ; (g) differing in this respect from the share under the statute, which vests in the children upon the death of the intestate, and which they are competent to devise by their wills at the period when the general disposing capacity arrives.

Of advancement under the custom.

What has already survived under the custom does not survive again, but will go according to the statute. (h) Where there is but *one* child, his orphanage part vests in him upon the death of the intestate, and may be devised by him at the same age at which he is competent to dispose of personal property by will. (i) And it is said that if an orphan daughter marries under 21, her orphanage share is prevented from surviving if she dies under that age. (k) If a freeman have one or more children, and he advances him, her or them, or any of them, in his life-time to the full extent to which the benefit under the custom would extend, the custom so far is satisfied : but the widow may still take her customary share, and the rest is distributed according to the statute. (l) But if the advancement is only in part, such advanced portion must be brought into hotchpot before any advantage can be taken under the custom. Such portion, however, is only shared with the other brothers and sisters, this rule of equality not extending to the benefit of the widow. (m) And if there be an only child so partially advanced, he shall take under the custom his full orphanage part, without accounting with the widow for his advancement. (n)

Where the portion so advanced exceeds the child's share under the custom, it seems settled, that after covering the orphanage part, to which it is *first applicable*, such excess ought to be brought into hotchpot, with all the persons entitled under the statute to the distributable part ; except, it is said, where the advancement has been *given and accepted expressly* in satisfac-

(g) Prec. Ch. 537.

(h) Prec. Ch. 537.

(i) Prec. Ch. 207.

(k) 1 Vern. 88.

(l) 2 P. Wms. 527. 1 Atk. 54.

(m) 1 Vern. 345.

(n) 2 Salk. 426.

tion of the customary share, in which case, in the distribution of the dead man's part, no regard is to be had to the advancement, it being considered as a sort of purchase by the child. (o)

The advancement must be wholly out of the personal estate: the custom takes no notice of real property: therefore, a settlement by a freeman of real estate on his child will not affect his right under the custom; (p) even though it be made in express exclusion thereof; and money given to be laid out in land is considered as real estate to this purpose. (q) The provision must always come from the father; it must be made by him in his *life-time*, and be out of his *personal* property. (r) Nor will every gift by the father so operate. Monies applied in maintenance and education, and perhaps in putting out apprentice, are not considered in the light of advancements, under the custom, any more than under the statute, though the last mentioned case is questionable. (s)

We have observed, that if a child be advanced above his or her share under the custom, whether such excess shall be brought into hotchpot or not will depend upon the question, whether the provision was or was not expressly made in satisfaction of the orphanage part. If made expressly in satisfaction of the orphanage part, it would be regarded as a sort of purchase; for it might have been less by the event. It is accordingly held, that if, upon the marriage of a freeman's daughter, at 21, the father settles a provision upon her, which she accepts in lieu of her orphanage part, equity will give effect to such agreement against the custom. (t) And if a man marry a freeman's daughter under age, he may release, or covenant to release, all future interest, in right of his wife, under the custom of London. (u)

(o) 4 Burn's Eccl. L. 207.

(p) 1 Vern. 2. 216.

(q) 1 Vern. 345.

(r) 1 Vern. 61, 89.

(s) 1 Atk. 403.

(t) 2 Eq. Ca. Abr. 272.

(u) 1 Atk. 63.



## SECTION V.

*Of Distribution by the Custom of York.*

THE custom of York agrees with that of London, except in the following particulars. The orphanage part vests in the child immediately on the death of the intestate, (a) instead of waiting for the age of 21. Real estate, however small the value, in comparison of the personal estate, if it comes by descent, or by limitation in a settlement made on the father's marriage, and whether in fee or in tail, in possession or reversion, excludes the claim to the filial portion, under the custom. (b) It is to be observed also, that the custom of York will not attach, unless the intestate was resident within the province at the time of his death : but as this is not necessary under the custom of London, this latter custom controuls that of York ; so that if a freeman of London die in the province of York, no inheritance in land shall preclude him from his share of the personal estate, by the custom of the city, which always follows the person. (c) Under both customs the locality of the property is immaterial.

For the convenience of the reader, an hypothetical list of cases, shortly stated and answered on this subject, shall be laid before him, which, with a little attention, may enable him at once to see the interests of parties under the statute, and the custom here treated of, either distinctly considered, or in combination.

By the statute of Distributions, 22 and 23 Car. 2. made perpetual by 1 Jac. 2. c. 17. the custom is saved, as well as to London and other places. These statutes work a distribution of the *pars rationabilis* ; or, as they call it in the province of York, *the death's part* : in every other respect the custom remains unaltered.

(a) 4 Burn's Eccl. L. 398.  
(c) 4 Burn's Eccl. L. 416.

(b) 4 Burn's Eccl. L. 409.

By the custom of the province of York :

The death's part { When a wife and children. } Third

When children and no wife,  
wife and no children, wife  
and heir, wife and co-heirs,  
wife and all advanced } Moiety.

When neither wife nor child-  
ren, altho' grandchildren ; no  
wife, and an only child, heir,  
or children, co-heirs, or all  
advanced } The whole.

Widow's part { When a child or children,  
not heirs } Third

When a child or children,  
heirs, no children, a child  
advanced, all advanced } Moiety.

Child or children's part. { No widow, another child,  
heir, or advanced, all the  
rest advanced } Moiety.

The heir at law has no share by virtue of the custom ; but has a share of that part of the estate of his father, dying intestate, called the death's part, according to the statute aforesaid.

Children advanced. All the children advanced in the father's lifetime are excluded by the same custom ; and also by the statute, save when there are no other children ; in which case they each respectively succeed as next of kin.

And observe that the said custom hath relation to, and doth respect, only widows and children.

The widow of an intestate succeeds both to her widow's part in the thirds, or moiety of the clear sur-

plus, according to the custom ; and also to her thirds, or moiety of the death's part, according to the statute ; and this she demands in the first place, and before the children can make any claim whatsoever.

The remainder of the death's part is by the same statute distributed amongst the children, the heir included, and in part advanced. And the remaining third, called the child or children's part, is by the said custom equally to be divided amongst them, excluding the heir. But the child in part advanced, claiming out of the last mentioned part his equal share, may throw in what he has received in part, and then the whole is equally to be divided.

N. B. The half-blood is entitled to the same shares and privileges as the whole blood, in all the cases following, without any distinction.

### CASES.

Case of an intestate's leaving a widow, child, or children, none advanced, and no heir.

One third is allotted to her as her widow's part, share, or thirds, due to her by virtue of the custom of the province aforesaid ; another third is due to children, equally to be divided amongst them, as their filial parts, or children's portions by the same custom ; and the third and last remaining part, commonly called the death's part, is to be distributed according as the said statutes do direct, *viz.* one third to the widow, and the remaining two-thirds to the said child, or amongst the said children.

Widow, children, heir.

One third is due to the widow by the said custom, one third to the children, the heir being excluded by the said custom from claiming any share : but the remaining third is to be divided in manner following, *viz.* one third to the widow, the rest among the children, including the heir, by virtue of the statute.

A widow, and a child being an heir.

A moiety due to the widow by virtue of the custom, remaining moiety one third to the widow, the rest to the child by virtue of the statutes aforesaid.

Widow three daughters co-heiresses.

A moiety is due to the widow as her share by the

custom; of the remaining part one third to the widow, and the rest among the co-heiresses.

One third of the whole is due to the widow as her share by the custom; and further, one third of the death's part by the statute; and as to the rest the child in part advanced must put what he has received in hotch-pot, and then the whole is to be equally divided between them.

Widow one child unadvanced, one in part advanced.

A third is due to the widow by the custom, and further one third of the death's part; all the rest is the child's.

Widow, one in part advanced.

Half to the widow; of the remainder, one third to the widow, the rest to the child.

Widow, one advanced.

One third is due to the widow by the custom, and also one third of the death's part, the remainder of the death's part is equally to be divided among all the children, whereof the heir is to be one, according to the statute; as to the remaining third part of the whole, called the children's part, the child in part advanced must put what he has received into hotch-pot, and then the whole is equally to be divided amongst them; the heir being excluded from this part according to the custom of the province.

Widow. one unadvanced and one in part advanced, an heir.

One third is due to the widow by the custom, and further one third of the death's part; the remainder of the death's part to be divided equally between the children, by virtue of the statute: but as to the child or children's part, the heir having no title to it, it is all due to the child, though in part advanced.

Widow, one in part advanced, and heir.

The widow must first have one third of the whole clear residue, and further one third part of the death's part, according to the statute; the remainder of the death's part is also distributed by the said statute amongst the children, heir, and grandchildren, in four parts, in manner following, *viz.* one fourth to the child unadvanced, one fourth to the child in part advanced, one fourth to the heir, and one fourth to the grandchildren, as representatives of their father. But as to the remaining third, called the children's customary

Widow, one unadvanced one in part advanced, heir and grandchildren.

part, the child in part advanced may put thereto what he has received; and then the whole must be equally divided between the unadvanced and the in part advanced children. The heir and grandchildren have no right by the custom, and the advanced are always excluded; yet the heir, though advanced, has a share in the death's part.

Widow and grandchildren.

A moiety is due to the widow by custom, half the remaining moiety to the said widow, and the rest among the grandchildren, as next of kin by the statute.

Widow and no children.

Half is to go to the widow, and half the remaining half to the widow, the rest to the next of kin, all equally amongst them, *viz.* a moiety as her due share by the custom, and the remainder of the death's part to be distributed in like manner, by act of parliament.

Children and no widow.

One moiety amongst them equally to be divided as their share, due by the custom, (excluding the heir;) the remaining part being the death's part, is to be divided in like manner, including the heir, by virtue of the statute.

One child and no widow.

All to him or her as next of kin.

One child unadvanced and an heir.

One moiety to the child unadvanced, as his customary share; the remaining moiety equally to be divided between them by the statute.

One advanced and heir.

All to the heir, the advanced having had his full share, and therefore excluded, both by the statute and the custom.

One advanced and one unadvanced.

All to the unadvanced, for the reasons aforesaid.

One advanced and one in part advanced.

All to the one in part advanced.

One in part advanced, and two unadvanced.

All must be put in hotch-pot, and equally distributed between them.

Heir, and one in part advanced.

A moiety, being the child or children's part, is due to the child, although in part advanced, (the heir having no title to the children's part by the custom:) but the other moiety being the death's part, is equally to be divided between them by the statute.

One moiety is the child or children's part, by the custom, (excluding the heir,) but he in part advanced must put what he has into hotch-pot, and then the said child's part must be divided between them, and the other part being the death's part, must be equally divided amongst them, including the heir, by virtue of the statute.

Heir, one in part advanced, and one unadvanced.

Equally amongst them, by virtue of the statute.

Three daughters, coheir-esses.

All to him as next of kin.

One child, heir, and unadvanced.

All must be equally divided between them, without any consideration had of the advancement by the statute.

Three coheir-esses, one being advanced.

A moiety is due to the daughter by the custom; and the other moiety being the death's part, is distributed by the statute, *viz.* one moiety to the said daughter, the rest to the grandchildren, as representatives of their father.

A daughter, grandchildren, by a son, (the heir) advanced.

All to him as next of kin.

Father.

In like manner.

Mother.

All equally amongst them share and share alike by the statute.

Mother, brother, and sister.

All equally amongst them: but the children are to have shares according to their several stocks or branches from which they are descended.

Brothers, and sisters, and brothers' and sisters' children.

All equally amongst them, (*per capita*) they being in equal degree of kindred.

Brothers' and sisters' children.

All to him or her, there being neither widow, children, father, mother, brother, sister, or their children.

Grandfather or grandmother.

Equally amongst them, as next of kin.

Grandchildren.

In like manner.

Uncles and aunts.

In like manner.

Cousins german.

The custom of London is the same, unless in a case where the eldest son has lands by descent, or by limitation in his father's marriage-settlement, which by that custom is no advancement.

## CHAP. III.

## OF THE LIABILITIES, DANGERS, AND DEFAULTS OF EXECUTORS.

## SECT. I.

*Liabilities of their Office.*

THE law makes an executor or administrator liable in his own property for any abuse of his official trust, whether the same consist in a wilful wasting of the effects, or a negligent administration of them. As, if he pays debts out of their order, or pays legacies without reserving sufficient to satisfy creditors ; or releases the debts of the testator without a satisfaction ; or changes the securities for debts ; or reduces the estate by submitting to arbitration ; or releases an action commenced ; or incurs a charge of interest, by delay in the payment of a debt, where he had assets to answer it ; or loses the property ; or trusts it to an agent who embezzles it ; or keeps money in an unproductive state for a length of time ; or sells the property much below the value ; or delays selling it till it is spoiled or injured, without reasonable excuse for the delay.

Thus where a debt was lost through the neglect of the executor, he was charged in equity with the amount. (a)

But the law attaches to the office of executor a reasonable degree of discretion, without embarrassing it

(a) *Lawson v. Copeland*, 2 Bro. C. C. 157.; and see *Powell v. Evans*, 5 Ves. J. 839. See also *Tebbs v. Carpenter*, 1 Madd. Rep. 290.



with an unreasonable degree of responsibility. If he invests money in the funds, he will not be answerable on the fall of the stock. (b) He may also call in a debt bearing interest, if he has reason to apprehend the principal to be in danger. (c)

He may appropriate the goods of his testator to the amount of what he has expended on account of the testator. (d) And, when it has been ultimately for the benefit of the property, he has been allowed monies given or released by which an apparent and immediate loss has been incurred. (e)

Neither will an executor be charged with the default or misconduct of his companion, if he has not been concerned in it, or contributed to it in any way. But if two executors join in a receipt, and one only receive the money, the general rule is, that both shall be held answerable. (1) Though if an executor who has merely joined in taking out probate, and has permitted his co-executor to possess himself of the assets, is not answerable for his receipts. (f) And an executor who has not proved, is not considered as acting, by assisting a co-executor, who has proved, in writing letters to collect debts, nor by writing to a debtor of the testator, to require payment. (g)

In what acts of his co-executor, an executor is implicated.

The act of participation, which is to involve one executor in the consequences of his companion's default, must be such as helped him to the commission of it. If, therefore, an executor does an act, by which money gets into the possession of another executor, he is equally answerable with the other, however innocently

(b) 3 Bro. C. C. 147, 433.

(c) 1 P. Wms. 141.

(d) Dy. 187 b. Plowd. 185.

(e) 3 P. Wms. 380.

(f) Hovey v. Blackman, 4 Ves. J. 609.

(g) Ord v. Newton, 2 Cox C. C. 274.

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(1) 1 P. Wms. 81, 243. 2 Bro. C. R. 116, 117.; and note a difference in this respect between co-executors and co-trustees, among which latter only the hand that actually receives incurs the responsibility, though all join in the receipt.

he may have conducted himself; not so, however, if he is merely passive by not obstructing the other in receiving it. And where an executor receives the money without the consent of his co-executors, and they afterwards join in the receipt for the same, this posterior act, as it did not enable the defaulter to obtain the money, will not, it is said, render them answerable. (*h*) Upon the whole, an executor is only liable for waste or loss by his co-executor to the extent of the assets in his hands, unless he has been in any way accessory to the loss or default; nor will one executor be affected by the notice which another has had, and concealed from him. (*i*)

If an executor receives money as such, and deposits it *bona fide* with his co-executor who is a banker of reputation, he shall not be charged with the loss in case of a failure of such banker. (*k*) And where a co-executor who had proved the will, but never acted in the office, received a bill on account of the estate by the post, and transmitted it immediately to the *acting* executor, he was held not answerable. (*l*)

A legatee to whom stock has been bequeathed specifically may claim to have its value at the time it ought to have been transferred to him; and, in case of misapplication by the executor, such executor will be compellable to replace that value; so if the stock has been withheld without a necessity for it, and has been depreciated during such retainer, the value must be made up by the executor. (*m*)

Of carrying on  
the testator's  
trade with the  
assets.

The case of the executor's carrying on trade with the testator's assets may be considered under two aspects, namely, his carrying it on with the express authority of the testator given by the will, and his carrying it on without such authority. If he carries it on

(*h*) 1 P. Wms. n. 1. Ambl. 417. 4 Ves. J. 596.

(*i*) Cro. Car. 603.

(*k*) 7 Ves. J. 197.

(*l*) 2 Ves. J. 678. And see Bacon v. Bacon, 5 Ves. J. 331. for cases of excusable loss by executors.

(*m*) Morley v. Bird, 3 Ves. J. 638. Chaworth v. Beech, 4 Ves. J. 555.

under such express authority, the testator's assets, as well as the property of the executor himself, will be subject to his bankruptcy: but, as between the executor and the testator's estate, his own property will be liable to make good any loss by such trading, though, if the trade turns out to be profitable, the benefit is wholly applicable to the purposes of the will. (2)

But the testator's assets are not liable; nor will they pass by the assignment of the commissioners, where they are specifically distinguishable, if the executor has carried on the testator's trade without any authority from him. And where under these circumstances the testator's assets are not specifically distinguishable, not only the creditors but the legatees of the testator will be let in to prove their demands to the extent of the assets so wasted by the executor in carrying on the trade. (n) If the testator restrict the power of carrying on his trade to a certain part or portion of the assets, specifically distinguishable from the residue, only such assets will be subject to the bankruptcy, while the *whole* of the executor's own property will still be liable. (o) What shall constitute a trading must depend upon the particular construction of the bankrupt laws.

Of the consequences of bankruptcy, where the testator's trade is carried on by the executor.

An executor's bankruptcy will not involve his right to act as executor, though for the safety of the pro-

(n) 10 Ves. J. 110. *Ex parte Garland*.

(o) 10 Ves. J. 110.

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(2) It has been lately held where the executors of a deceased partner continued his share of the partnership property in trade for the benefit of his infant daughter, that they were liable upon a bill drawn for the accommodation of the partnership, and paid in discharge of the partnership debt; although their names were not added to the firm, but the trade was carried on by the other partners under the same firm as before; and the executors, when they divided the profit and loss of the trade, carried the same to the account of the infant. *Wightman v. Townroe*, 1 M. and S. 412. They are the legal proprietors in respect of every thing belonging to the trade, and consequently are liable to the legal debts. *Ibid.* per Bailey, J.

perty the Court of Chancery will upon proper application appoint a receiver; and where the assignees of such bankrupt executor have received a part of the monies belonging to the testator's estate, it will direct the bankrupt to be received in his character of executor as a proving creditor against his own estate, but will order the dividend to be paid into the bank. (*p*)

The executor of an executor is liable, as such, for the waste committed by his immediate testator.

The statute 4 and 5 W. and M. c. 24. s. 12. enacts, that an executor of an executor shall be liable as such for the waste committed by his immediate testator, which, as being a tort, would at common law have died with the party guilty thereof.

In all cases of debt and contract the liability reaches to the executor who is answerable in his representative character. Whether the debt of the testator arose by record, specialty, or simple contract, it survives against his representative, who sustains the duties, as well as exercises the rights, of the deceased. It is said also that debt will lie against the executor of a sheriff for an escape, (*q*) though an action on the case for the same cause cannot be brought against the executor. Issues forfeited and fines imposed in inferior courts of record, as at quarter sessions, and by stewards in their leets, are said to be recoverable against the representative. (*r*) So also a relief, or fine due to the Lord of the manor from the testator. (*s*) Upon breaches of covenant by the testator, where the subject of the contract was valuable and beneficial, as to pay rent or repair premises, the contract may be enforced against the executor. And whether a contract be under seal, or not, whether it be express or implied, it devolves upon the legal representative, who is equally answerable for a bill or note on which the deceased had incurred an express responsibility, and for such liabilities as arise

(*p*) 1 Atk. 101, 213. 2 P. Wms. 546.

(*q*) Dyer 322.

(*r*) Com. Dig. Admon. B. 14.

(*s*) Com. Dig. B. 14.

by implication, and belong to the head of implied assumpsit. Remedies which are given for mere wrongs and grievances, and such as are denominated *torts*, or which imply force and disturbance, such as battery, false imprisonment, trespass upon lands, slander, nuisance, and the like, are within the scope of the rule—*actio personalis moritur cum persona*.

Sometimes, indeed, by varying the denomination of the action, the difficulty interposed by the above rule may be got over. Thus, although the action of trover will not lie against the executor for a conversion by the testator, because the plea to that form of action is *not guilty*, and so the question is upon the *guilt* of the person deceased; yet, if the property was sold by the testator, his executor may be sued in the form of assumpsit, on the liability of the testator for money had and received to the use of the plaintiff. And so in similar cases. The true grounds and criteria of these distinctions will be found in the case of *Hambly v. Trott*. (*t*)

Though the cause of action should not arise upon a contract of the testator until after his decease, the executor is liable to the extent of the assets, as where money becomes due upon the testator's bond or note after his death. (*u*)

An executor by his misconduct may make himself personally responsible, and liable to answer a demand originating with his testator, out of his own property. Thus if he be guilty of wasting the effects of the testator, which in legal language is called a *devastavit*, the judgment in the action against him will be *de bonis propriis*. (*x*) A false defence, where the falsity must lie within his own knowledge, induces the same consequence to him; as if he pleads a *release* made to himself; (*y*) or that he never was an executor. (*z*) In

Of the consequences of wasting the testator's assets, or of making a false defence to an action.

(*t*) Cowp. 375.

(*u*) Com. Dig. Pleader (2 D. 2.)

(*x*) 3 Bac. Abr. 77.

(*y*) Cro. Jac. 671.

(*z*) 1 Roll. Abr. 930, 933.

such cases if the plea be found against him, the judgment will be in the alternative *de bonis testatoris ; et si non, de bonis propriis*.

Where an executor may be held to bail.

Though executors are not in general liable to be held to bail in their representative capacity ; (a) yet as, by wasting the property, they render themselves personally liable, such misconduct is followed also by a liability to be arrested and held to bail. (b) But the suggestion of such a *devastavit* will not create this liability without the oath of the plaintiff. (c) If the sheriff returns a *devastavit* to a writ of execution, the executor may be held to bail in an action on the judgment. (d) And it seems that wherever an executor has by an actionable promise rendered himself liable in his own person to pay the debt of his testator, he may be compelled to find bail to the action. (e)

Of the pleading by executors, and of the judgment and execution against them.

An executor defendant is entitled to be paid costs if the judgment in the action is in his favour. (f) And if he plead a plea which is false, the judgment as to the costs will be *de bonis testatoris si, et si non, de bonis propriis*. (g) But if he plead that he has fully administered, or that he has administered all except, &c. and the plaintiff, admitting the truth of such plea, take judgment of the future assets in the one case, or of the assets admitted in part, and for the residue of assets *in futuro* in the other, such defendant executor will not be liable to costs. Nor, as it seems, if he plead several pleas, as non-assumpsit, and plene administravit, and one of them be found for him, but if the plaintiff take judgment on the plea of plene administravit of the assets *in futuro*, and go to trial on the non assumpsit, and obtain a verdict, he will be entitled to costs. (h)

The judgment in common cases against an executor or administrator is for the debt, or damages, and costs to be levied of the goods and chattels of the testator,

(a) 3 Bac. Abr. 101.

(b) Ibid.

(c) Ibid.

(d) Ibid.

(e) 1 T. R. 716.

(f) 3 Bac. Abr. 100.

(g) Ibid.

(h) Tidd. K. B. 896.

or intestate, in the hands of the defendant, if he have so much thereof in his hands to be administered ; and if he have not, then the costs to be levied of his own proper goods. (i) If the sheriff return *nulla bona* generally, the proceeding may be by *scire fieri*, or by action of debt on the judgment suggesting a *devastavit*.

On the latter, he may have execution immediately against the defendant in all its different forms of *capias ad satisfaciendum*, *fieri facias*, *de bonis propriis*, or writ of *elegit*. (k) The form and incidents of the judgment of assets *quando acciderint* may be accurately understood by consulting the authorities in the margin. (l)

Since the statute 38 Geo. 3. c. 87. an executor can neither sue nor be sued till he arrives at the age of twenty-one : but where there are several executors, and some under age, the action must be against all such as are under age appearing by guardians. If there be more executors than one, they must regularly be all sued together ; that is, where they have all administered : but where any have not administered, such need not be joined ; (m) the case of plaintiffs executors being in this respect different, for they *must* all join, though all may not have administered. Strangers have no means of knowing who are executors but by their visible acts.

The husband of an executrix must be joined in an action against her (l) but if such action be brought jointly against them, and a judgment being obtained, the husband die leaving his wife surviving him, no action of debt on such judgment will lie against her suggesting a *devastavit* of the husband. Nevertheless, if an executrix marry, and the husband be guilty of wasting the goods, this will be also the *devastavit* of the wife, and both will be answerable. (n) So again, if an exe-

Of the liabilities of husband and wife executrix, reciprocally, for waste done by the other.

(i) Tidd. K. B. 931. 4 T. R. 648. 7 T. R. 359.

(k) Tidd. K. B. 942, 957.

(l) Tidd. Pract. K. B. 1038. *et seq.* 2 Saund. 226. 1 Vent. 94, 95. 7 T. R. 29.

(m) 1 Lev. 161.

(n) Ambl. 162.



cutrix commit a *devastavit*, and afterwards marry, the husband, together with his wife, is chargeable for it during the coverture. (o)

Of the consequences of the marriage of an executrix, where the testator is indebted to her, or where her husband is indebted to the testator.

If the testator, being indebted to a woman, make her his executrix, and she afterwards marry, or were married in his lifetime, the husband may retain the debt out of the assets; and if the husband were indebted to the testator, and his wife be made executrix, the debt is released in law, as much as if the wife herself had been the debtor; though if an executrix, after the death of the testator, marry the debtor of the testator, this will be in law a *devastavit*. (p) These doctrines are consequences of the principle, that, if a married woman be an executrix or administratrix, the husband has a joint interest with her in all the effects of the deceased; and is enabled by law to assume the whole administration, and to act in it to all purposes with, or without, the consent of the wife. (q) Nor can the wife do any valid act as such executrix or administratrix, without the husband's concurrence. (r) Nevertheless, if the husband die in her lifetime, the right of administration survives to her; and, on the other hand, nothing survives to the husband, in case of her death in his lifetime; and it is said that, if she make a will, even without her husband's consent, though to all other purposes such will is inoperative, yet it may transmit the executorship in respect to the property so vested in her *in auter droit*. (s)

An executor may sue, but not be sued, in a court of conscience.

Although an executor is entitled as such to sue in a Court of conscience, he is not liable to be sued there; such a Court not being a proper tribunal to take account of assets. (t)

Of the superior relief in equity against executors.

Persons entitled to legacies under a will, or to distributive shares of an intestate's effects, may assert their claims in Courts of Equity, which can not only

(o) Cro. Car. 510.

(p) Ex. Off. 207.

(q) Com. Dig. D. 4 T. R. 617.

(r) Off. Ex. 207. Com. Dig. D.

(s) 2 Bl. Com. 408.

(t) Doug. 263.

give effectual relief, but stipulate terms conducive to general justice, and the conscientious claims of all parties. Equity, as we have seen, not only considers an executor as a trustee, and therefore liable to account upon oath, (3) but in certain cases as trustee for the nearest of kin of the undisposed surplus. A bill, therefore, in equity is the mode of compelling a discovery of assets, as well as an account; and also of calling for a distribution, under the statute, of an intestate's personal estate. (u) And if, without a reasonable cause assigned, an executor detain the effects for a length of time, or use them in trade, or even keep them idle and unproductive in his hands, he will be called upon for interest in a Court of Equity. (x) In every case where an executor is made to pay interest for a breach of trust, he is liable, as of course, to costs; (y) *à fortiori*, where he is convicted of conduct directly and palpably fraudulent; even though the will may have directed his expenses to be paid out of the estate. (z) But where an executor fails in a suit, instituted merely for obtaining the opinion and directions of the Court, he will not be subjected to costs. (a)

It is a general rule in Courts of Equity, that all persons are to be made parties, who are either legally or beneficially interested in the subject matter and result of the suit. All trustees, therefore, and all executors and administrators, who are considered as trustees in Courts of Equity, must be made parties to every suit that concerns the subject matter of their trust; as where the suit regards the payment of a legacy, or an annuity, marshalling assets, the payment of debts, or

Of the necessary parties to suits.

(u) Com. Dig. Chancery, (3 D. 1.)

(x) 1 Ves. J. 704.

(z) 2 Atk. 126.

(y) Ibid.

(a) 1 Ves. J. 205.

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(3) Guardians and receivers, being bound by recognizance to account regularly, may be obliged so to do on application by petition: but there is no regular way of calling an executor to account, but by filing a bill.

distributive shares. (b) So an executor appointed only *durante minore ætate*, if he have possessed himself of any part of the assets, must be a party to any suit instituted respecting them.

An executor before probate may file his bill, and it is sufficient, if he afterwards takes out probate at any time before the hearing; (c) but in a bill for an account of the personal estate of the deceased, though the person who has a right to administer is made a party, this is not sufficient without an actual administration taken out. (d) If, however, a sufficient reason be stated in the bill for not bringing an executor into Court, as, if he be resident out of the jurisdiction of the Court, (e) or if the representation be charged to be in litigation in the ecclesiastical Court, or the plaintiff do not know who he is, (f) it is not an objection that the executor is not a party. Again, in the case of a mortgage in fee, a bill to redeem must make the executor of the mortgagee a party to the suit, as well as the heir at law, because the money is to return to the same fund out of which it came: but in a bill to foreclose the heir of the mortgagor, it is not necessary to make the personal representative a party to the suit; (g) and if a tenant in fee mortgage, by creating a term, the personal representative ought not to be a party to a bill of foreclosure; (h) for though the heir is entitled to have the personal estate applied in exoneration of the real, yet he must enforce that right by filing his bill; and so if the heir pays out of the assets descended the specialty debt of the ancestor, it belongs to him to exhibit his bill against the personal representative, to compel the application of the personal estate in exoneration of the real: but this is not the concern of the creditor.

The above-mentioned rule, however, is not without

(b) Rep. temp. Finch 82.

(c) 3 P. Wms. 352.

(d) 3 P. Wms. 349. : but see Prec. in Ch. 63, 64.

(e) Prec. in Ch. 83.

(f) 2 Atk. 51. 1 Vern. 95.

(g) 3 P. Wms. 334. note A.

(h) 13 Ves. J. 234.

some exceptions; as where creditors are seeking an account of the estate of their deceased debtor, for the payment of their demands, a few of the whole number are permitted to maintain the suit, in behalf of the rest, who are allowed to come in under the decree. (*i*) So also one legatee may sue without the others, who may come in under the decree; (*k*) yet where the residue of the personal estate was devised to three, it has been held that one could not sue for his part, without joining the others. (*l*) And so where the residue was limited to one for life, and upon his decease to other persons, remainders over, it was held that all persons interested under the limitations must be parties to a bill for the payment. (*m*) But one of the next of kin of an intestate may sue for his distributive share; and the master will be directed to enquire, and state to the Court, who are the next of kin of the intestate, and they may come in under the decree; though if it appears by the bill, that the plaintiff knows who are the other next of kin, it seems he must make them parties to the suit.

(*i*) 2 Ves. 312.(*k*) 2 Ch. Ca. 124.(*l*) 3 Bro. C. C. 365.(*m*) 3 Bro. C. C. 229.

## SECT. II.

*Liabilities from their own Undertakings and Engagements.*

THE first branch of the 4th section of the statute of Frauds, 29 Car. 2. c. 3. enacts that no action shall be brought, whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.

To bring the party within the protection of the fourth section of the statute of frauds, he must have been actual executor or administrator, when he made the promise.

It seems proper to premise, that to bring the party within the protection of this provision of the statute, he must be actually invested with the office, at the time of making the promise: he can receive no benefit from it, by acquiring the office after the promise has been made by him; for which, if it were not clear enough upon the words of the statute, the case of *Tomlinson v. Gill* (a) is an authority. As an immediate executor derives all his title from the will of the person he represents, and the interest and office are completely vested in him at the instant of the testator's death, his verbal promise is prevented by this statute from binding him personally, though he makes it before probate, which is not the origin, but the authentication, of his title. But an administrator derives his office and interest from the ordinary; and, therefore, a verbal promise by a person, in virtue of his expectation of representing an intestate, is not invalid-

(a) Ambl. 330.

ated by this clause of the 4th section ; and though the grant of administration has relation to the time of the intestate's death, (b) such relation cannot, it is presumed, affect the application of the statute.

The statute of frauds and perjuries, in superadding the necessity of writing, to give an actionable effect to the promises therein specified, has given no positive virtue to the writing itself. so as to make it a substitute for the consideration necessary to support the promise according to the ancient maxims of our municipal law. The judgment of C. B. Skinner in the House of Lords, in the case of *Rann v. Hughes*, (c) is clear upon this point, which arose upon a promise in writing, made by executors, and wherein the Chief Baron, in very distinct terms, made it appear, that this branch of the statute, being made for the relief of personal representatives, did certainly not intend to charge them further than by common law they were chargeable. To that judgment, therefore, the reader is referred as a satisfactory argument for this construction of the statute.

To the comments of the Chief Baron it may be added, that there not only exists as much necessity since, as before, the statute, for a consideration to support a promise, though made in writing, but the consideration also continues to be an essential part of the allegations in the declaration in an action upon such promise. For the statute has made no alteration in the method of pleading, either by addition or curtailment, so that as on the one hand the consideration continues necessary to be stated, agreeably to the rule at the common law ; so on the other, it is not held to be necessary on account of the statute, to shew by the declaration that the promise was in writing ; but it is left to evidence ; which last-mentioned point rests upon the general rule, distinguishing between the cases wherein a matter has its *origin* in an act of parliament, and is thereby required to be in writing, and where an act of parliament makes writing

The statute has made no alteration in the mode of pleading ; therefore, though the promise is in writing, the declaration must still set forth the consideration ; though it is not necessary to shew that the promise was in writing.

(b) 2 Roll. Abr. 554.

(c) 7 T. R. 350. N. (a.) 7 Bro. P. C. 556. S. C.

necessary to a matter existing at common law ; in the latter of which cases the thing need not be shewn in pleading to be in writing ; but in the former, it must be pleaded with all the circumstances required by the act. (*d*) Thus, a will must be pleaded to be in writing, upon the statute of Henry 8., for by that statute the power of devising is, in certain cases, *first* given ; and it is by virtue of that act consequentially enlarged by the statute of 12 Car. 2. that we now exercise the testamentary power over real estate (1). The result is, that

(*d*) 2 Salk. 519. and see 3 Burr. 1890, per Yates, Justice.

But though the declaration need not state the promise to have been in writing, if such promise is pleaded by the defendant, the plea should shew it to have been in writing.

(1) It has generally been holden, however, upon the several branches of the 4th section of the statute, that though a plaintiff need not in his declaration shew any note in writing, but that it will be sufficient for him to produce it on the trial ; yet that if such promise be pleaded in bar of another action, it must be alleged to be in writing, so as that it may appear to be a contract on which an action will lie. Thus in a case which took place a very few years after the statute was passed, *Elizabeth Case v. James Barber*, Sir Thomas Raym. 460., the plaintiff declared in *indebitatus assumpsit* for 20*l.* for meat, drink, washing, and lodging, for the defendant's wife, provided for her at the request of the defendant ; the defendant pleaded, that after the making of the promise, &c. and before the exhibiting of the plaintiff's bill, it was agreed between the plaintiff and defendant and one J. B. his son, that the plaintiff should deliver to the defendant divers clothes of the defendant's wife's, then in the plaintiff's custody, and that the plaintiff should accept the said J. B. the son for her debtor for 9*l.* to be paid as soon as the said J. B. should receive his pay due from His Majesty to him as lieutenant of the ship, called, &c. in full satisfaction and discharge of the premisses in the declaration mentioned ; and averred, that the plaintiff at the same time did deliver to the defendant the said clothes, and that she accepted the said J. B. the son for her debtor for the said 9*l.* and that the said son agreed to pay the same accordingly ; and that the said J. B. afterwards, and as soon as he received his pay as aforesaid, viz. on such a day, was ready, and offered to pay the 9*l.* and the plaintiff refused to receive it, *et hoc paratus*, &c. to which plea the plaintiff demurred. And judgment was given for the plaintiff for two reasons: 1. Because it did not appear that there was any consideration for the promise on the son's part. 2. Admitting that there *was* a consideration, yet, that by the statute of frauds and perjuries, the agreement ought to be in writing, or the plaintiff could have no remedy thereon ; and though upon such an agreement the plaintiff need not set forth the agreement to be in writing,



a promise to charge an executor personally, and in his own right, so as to make him liable to pay out of his own property, must not only be in writing, but founded upon a sufficient consideration in law; which *authentication by writing* must be proved by the production of the writing itself, and which *consideration* must be both proved and stated.

In order to charge the executor or administrator *de bonis propriis*, it is not necessary to aver in the declaration that the defendant has assets; for if the promise be in writing, and supported by a consideration, as forbearance to prosecute, at the request of the defendant (2), the plaintiff, by acquiescing in a possible de-

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yet when the *defendant* pleads such an agreement in bar, he must plead it so that it may appear to the court, that an action will lie upon it; for he shall not take away the plaintiff's present action, and not give him another upon the agreement pleaded.

The case of *Villers v. Handley*, in the Common Pleas, 2 Wils. 49. proceeded upon the same doctrine upon the 3d section of the statute, which enacts, that no leases, estates, or interests, either of freehold, or terms of years, or any uncertain interest, not being copyhold or customary interest, of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, shall be assigned, granted, or surrendered, unless it be by deed, or note, in writing, signed by the party so assigning, granting, or surrendering the same, or their agents thereunto lawfully authorized by writing, or by act or operation of law. The action was debt upon a bond for 52*l.* 16*s.* against the heir of the obligor; the defendant confessed the bond and debt, but pleaded that he had nothing by descent but a small cottage in T. except a reversion after a term of 500 years, commencing the 16th of October 1746, then to come and unexpired, and *hoc paratus*, &c. to which plea there was a general demurer. And for the plaintiff it was objected that the plea was ill in substance, because it was not alleged therein, that the lease for 500 years was *in writing* (according to the book, because it was not alleged to be by *deed*, which seems to have proceeded upon a mistake of the law; and see the same book, page 26, *Farmer on Dem. Earl v. Rogers*) and because if the lease was not in writing, it was void by the statute of frauds and perjuries; and of this opinion was the court, (Clive and Bathurst, Justices, being present) and upon this point they gave judgment for the plaintiff.

(2) In *William Banes's* case, 9 Rep. 93 b. it was clearly held, that the declaration was good enough, without saying that defendant had assets; for it shall be intended *prima facie*, that she had assets. But

What allegations are necessary to be made in the pleadings in

triment to himself, by his relinquishment of legal proceedings (for he might at least have obtained a judgment of *assets quando acciderint*) has purchased a title

actions on the special promise of executors and administrators.

Coke said, that he conceived the truth to be, that if there had not been any debt, or if there had been a debt, and the executrix had nothing in her hands at the time, she might have given it in evidence. But this last position seems not to be law, according to the cases, see 1 Roll. Abr. 24. pl. 33. *Davis v. Reyner*, 2 Lev. 3. *Goring v. Goring*, Yelv. 11. *Davis v. Wright*, 1 Vent. 120. *Trewinian v. Howell*, Cro. El. 91. *Reech v. Kennegal*, 1 Ves. 223. But it seems clear enough that the executor must be liable, and that there must be an existing debt; otherwise there will be no consideration. An executor so closely represents the person of the testator, that if a man executes a bond, his executors are bound, though they are not named; therefore in a declaration against the executor upon the bond of the testator, it is not necessary to say that the obligor bound himself and his executors; but if the suit be against the heir, it is a material allegation to say, that the ancestor bound himself and his heirs, and to prove that he did so in fact; for the heir is not bound by his ancestor's bond, unless he be expressly named. If, therefore, the declaration omits to state that the heir was bound, it is substantially defective: and by the case of *Barber v. Fox*, 2 Saund. 136. it appears that this is such a defect as a verdict cannot cure; for unless it be shewn upon the pleadings that the heir was bound, there will appear to have been no consideration for his promise, and so no sufficient cause of action. Thus also, if the heir promise to pay a simple contract debt of the ancestor, no action will lie upon this promise, in as much as it is without consideration, for the heir is not chargeable upon such debts of his ancestor. Cro. James, 47. *Fish v. Richardson*. But if an executor promise to pay, in consideration of a consent only by an assignee of a debt not to sue, the promise stands upon a sufficient consideration, 1 Roll. Abr. 20, pl. 11. And so, doubtless, the heir, under the same circumstances, will be liable, if the debt be founded upon a specialty.

In *Forth v. Stanton*, 1 Saund. 210. there was no allegation of any undertaking to forbear on the part of the assignees; which case was thus—Plaintiff declared that the defendant's testator was indebted to A. who, after the testator's death, assigned the debt to the plaintiff, and appointed him to receive it to his own use; and that the defendant, in consideration that the plaintiff would accept the defendant for his debtor, promised to pay the debt to the plaintiff. And, for want of alleging a sufficient consideration for the promise, the declaration was judged insufficient. Upon the principle of the determination, in *Barber v. Fox*, cited above in this note, it seems that a verdict for the plaintiff could not have cured this radical defect: but in the case

of action upon the undertaking of the defendant. But without such special agreement, in which the executor steps out of his representative character, an action cannot be sustained against an executor, otherwise than as an executor; and if the action is brought against him in the character of executor, to recover a demand out of the testator's estate, any special promise to pay the testator's debt is a mere *nudum pactum*, if there be no assets; and if there be any, the extent of the promise is measured by the extent of the assets; or, in other words, the promise superinduces no new obligation upon the original representative liability. Since the case, however, of *Wain v. Warlters*, (e) and more particularly *Egerton v. Matthews*, (f) it seems that the writing, to be valid, within the fourth section of the statute, should, in the case of such promise made by an executor, not only state the consideration whether it be forbearance of suit, or whatever else, in terms, but that the undertaking on both sides should be comprised in the agreement, so as to make it a subject of action to either party; for it was intimated by the Chief Justice, in the first-mentioned case, that the obligatory part of the transaction was indeed the promise, which will ac-

(e) 5 East. 10.

(f) 6 East. 307.

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of *Roe v. Hugh*, 1 Salk. 29. which was the converse of the last mentioned case in its circumstances, and in the relative situation of the parties, the verdict was held by four judges against three to have cured the omission to allege a sufficient consideration in the declaration. There, in consideration that the plaintiff would accept C. to be his debtor for 20*l.* due to him from A., in the place of A., C. promised and undertook to B. to pay to him the 20*l.*; and this was adjudged good, after a verdict, without express averment that A. was discharged; for the majority of the Judges in the Exchequer Chamber held that being after verdict, they ought to do what they could to help it, and that, therefore, they would not take it as a promise only on the part of C. because as such it could not bind, unless A. was discharged; but they construed it as a mutual promise, viz. that C. promised B. to pay the debt, and B. promised *consideratione inde* to discharge A.

count for the word *promise* being used in the first part of the clause : but still, in order to charge the party making it, the statute proceeds to require that the *agreement*, by which must be understood *the agreement in respect of which the promise was made*, must be reduced into writing.



# APPENDIX.

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## I. THE STATUTES.

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29 Car. 2. c. 3.

### *An Act for the Prevention of Frauds and Perjuries.*

FOR prevention of many fraudulent practices, which are commonly endeavoured to be upheld by perjury, and subornation of perjury; be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and the Commons, in this present Parliament assembled, and by the authority of the same, That, from and after the four and twentieth day of June, which shall be in the year of our Lord one thousand six hundred seventy and seven, all leases, estates, interests of freehold, or terms of years, or any uncertain interest of, in, or out of any messuages, manors, lands, tenements, or hereditaments, made or created by livery and seisin only, or by parol, and not put in writing, and signed by the parties so making or creating the same, or their agents thereunto lawfully authorised by writing, shall have the force and effect of leases or estates at will only, and shall not either in law or equity be deemed or taken to have any other or greater force or effect; any consideration for making any such parol leases or estates or any former law or usage to the contrary notwithstanding.

Parol leases and interests of freehold shall have the force of estates at will only.

II. Except, nevertheless, all leases not exceeding the term of three years from the making thereof, whereupon the rent

Except leases not exceeding three years, &c.

reserved to the landlord, during such term, shall amount unto two third parts at the least of the full improved value of the thing demised.

No leases or estates of freehold or copyhold shall be granted or surrendered by word.

III. And moreover, That no leases, estates, or interests, either of freehold, or terms of years, or any uncertain interest, not being copyhold or customary interest, of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, shall at any time after the said four and twentieth day of June, be assigned, granted, or surrendered, unless it be by deed or note, in writing, signed by the party so assigning, granting or surrendering the same, or their agents thereunto lawfully authorised by writing, or by act and operation of law.

Promises and agreements by parol.

IV. And be it further enacted by the authority aforesaid, That, from and after the said four and twentieth day of June, no action shall be brought, whereby to charge any executor or administrator, upon any special promise, to answer damages out of his own estate ; (2) or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriages of another person ; (3) or to charge any person upon any agreement made upon consideration of marriage ; (4) or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them ; (5) or upon any agreement that is not to be performed within the space of one year from the making thereof : (6) unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised.

Devises of lands shall be in writing, and attested by three or four witnesses.

V. And be it further enacted, by the authority aforesaid, That from and after the said four and twentieth day of June, all devises and bequests of any lands or tenements, devisable either by force of the statute of wills, or by this statute, or by force of the custom of Kent, or the custom of any borough, or any other particular custom, shall be in writing, and signed by the party so devising the same, or by some other person, in his presence, and by his express directions, and shall be attested and subscribed in the presence of the said devisor, by three or four credible witnesses, or else they shall be utterly void, and of none effect.

How the same shall be revocable.

VI. And moreover, No devise in writing of lands, tenements, or hereditaments, or any clause thereof, shall at any time after the said four and twentieth day of June, be revocable, otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, cancelling, tearing, or

obliterating the same by the testator himself, or in his presence; and by his directions and consent; (2) but all devises and bequests of lands and tenements shall remain and continue in force until the same be burnt, cancelled, torn, or obliterated, by the testator, or by his directions, in manner aforesaid, or unless the same be altered by some other will or codicil in writing, or other writing of the devisor, signed in the presence of three or four witnesses, declaring the same; any former law or usage to the contrary notwithstanding.

VII. And be it further enacted, by the authority aforesaid, That, from and after the said four and twentieth day of June, all declarations or creations of trusts or confidences, of any lands, tenements, or hereditaments, shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect.

All declarations or creations of trusts shall be in writing.

VIII. Provided always, That where any conveyance shall be made of any lands or tenements, by which a trust or confidence shall or may arise or result by the implication or construction of law, or be transferred or extinguished by an act or operation of law, then, and in every such case, such trust or confidence shall be of the like force and effect, as the same would have been, if this statute had not been made; any thing hereinbefore contained to the contrary notwithstanding.

Trusts arising, transferred, or extinguished by implication of law, are excepted.

IX. And be it further enacted, That all grants and assignments of any trust or confidence shall likewise be in writing, signed by the party granting or assigning the same by such last will or devise, or else shall likewise be utterly void, and of none effect.

Assignments of trust shall be in writing.

X. And be it further enacted by the authority aforesaid, That from and after the said four and twentieth day of June, it shall and may be lawful for every sheriff, or other officer, to whom any writ or precept is or shall be directed, at the suit of any person or persons of, for, and upon any judgment, statute, or recognizance, hereafter to be made, or had, to do, make, and deliver execution unto the party in that behalf suing, of all such lands, tenements, rectories, tithes, rents, and hereditaments, as any other person or persons be in any manner of wise seised or possessed, or hereafter shall be seised or possessed, in trust for him against whom execution is so sued, like as the sheriff or other officer might or ought to have done, if the said party against whom execution hereafter shall be so sued had been seised of such lands, tenements, rectories, tithes, rents, or other hereditaments, of such estate as they be seised of in trust for him at the time of

Lands, &c. shall be liable to the judgments, &c. of cestui que trust.



And held free from the incumbrances of the persons seised in trust.

Trusts shall be assets in the hands of heirs.

No heir shall by reason thereof become chargeable of his own estate.

Estates *per auter vie* shall be devisable.

And shall be assets in the heir's hand.

And where there is no special occupant, shall go to the executors.

the said execution sued, (2) which lands, tenements, rectories, tithes, rents, and other hereditaments, by force and virtue of such execution, shall accordingly be held and enjoyed, freed and discharged from all incumbrances of such person or persons, as shall be so seised or possessed in trust for the person against whom such execution shall be sued; (3) and if any *cestui que trust* hereafter shall die, leaving a trust in fee-simple to descend to his heir, there, and in every such case, such trust shall be deemed and taken, and is hereby declared to be assets by descent, and the heir shall be liable to and chargeable with the obligation of his ancestors for and by reason of such assets, as fully and amply as he might or ought to have been, if the estate in law had descended to him in possession in like manner as the trust descended; any law, custom, or usage, to the contrary in anywise notwithstanding.

XI. Provided always, That no heir shall become chargeable by reason of any estate or trust made assets in his hands by this law, shall by reason of any kind of plea, or confession of the action, or suffering judgment by *nient dedire*, or any other matter be chargeable, to pay the condemnation out of his own estate; (2) but execution shall be sued of the whole estate, so made assets in his hands by descent, in whose hands soever it shall come, after the writ purchased, in the same manner as it is to be at and by the common law, where the heir at law pleading a true plea, judgment is prayed against him thereupon; any thing in this present act contained to the contrary notwithstanding.

XII. And for the amendment of the law in the particulars following, (2) be it further enacted by the authority aforesaid, That from henceforth any estate, *pur auter vie*, shall be devisable by a will in writing, signed by the party so devising the same, or by some other person in his presence, and by his express directions, attested and subscribed in the presence of the deviser, by three or more witnesses; (3) and if no such devise thereof be made, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of a special occupancy, as assets by descent, as in case of lands in fee-simple, (4) and in case there be no special occupant thereof, it shall go to the executors or administrators of the party that had the estate thereof, by virtue of the grant, and shall be assets in their hands.

XIII. And whereas it hath been found mischievous, that judgments in the King's Courts, at Westminster, do many times relate to the first day of the term whereof they are en-

tered, or to the day of the return of the original, or filing the bail, and bind the defendant's lands from that time, although in truth they were acknowledged, or suffered and signed in the vacation time, after the said term, whereby many times purchasers find themselves aggrieved,

XIV. Be it enacted, by the authority aforesaid, That from and after the said four and twentieth day of June, any judge or officer of any of his Majesty's Courts of Westminster, that shall sign any judgments, shall, at the signing of the same, without fee for doing the same, set down the day of the month and year of his so doing, upon the paper, book, docket, or record, which he shall sign; which day of the month and year shall be also entered upon the margin of the roll of the record, where the said judgment shall be entered.

The day of signing any judgment shall be entered on the margin of the roll.

This clause extends to counties palatine, by 8 Geo. I. c. 25. s. 6.

XV. And be it enacted, That such judgments as against purchasers *bona fide*, for valuable consideration of lands, tenements, or hereditaments, to be charged thereby, shall, in consideration of law, be judgments only from such time as they shall be so signed, and shall not relate to the first day of the term whereof they are entered, or the day of the return of the original, or filing the bail; any law, usage, or course of any Court to the contrary notwithstanding.

And such judgments as against purchasers shall relate to such time only.

XVI. And be it further enacted, by the authority aforesaid, That, from and after the said four and twentieth day of June, no writ of *fiery facias*, or other writ of execution, shall bind the property of the goods against whom such writ of execution is sued forth, but from the time that such writ shall be delivered to the sheriff, under-sheriff, or coroners, to be executed: and for the better manifestation of the said time, the sheriff, under-sheriff, and coroners, their deputies and agents, shall upon the receipt of any such writ, (without fee for doing the same,) endorse upon the back thereof the day of the month or year whereon he or they received the same.

Writs of execution shall bind the property of goods but from the time of their delivery to the officer.

XVII. And be it further enacted, by the authority aforesaid, That, from and after the said four and twentieth day of June, no contract for the sale of any goods, wares, and merchandises, for the price of ten pounds sterling, or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such a contract, or their agents thereunto lawfully authorized.

Contracts for sales of goods for ten pounds or more.

The day of the inrolment of recognizances shall be set down; and lands in the hands of purchasers bound from that time only.

Nuncupative wills.

Explained by 4 Ann, c. 16. s. 14.

Probates of nuncupative wills.

XVIII. And be it further enacted, by the authority aforesaid, That the day of the month, and year of the inrolment of the recognizances, shall be set down in the margent of the roll where the said recognizances are enrolled; (2) and that from and after the said four and twentieth day of June, no recognizance shall bind any lands, tenements, or hereditaments, in the hands of any purchaser, *bona fide*, and for valuable consideration, but from the time of such enrolment; any law, usage, or course of any Court to the contrary in any wise notwithstanding.

XIX. And for prevention of fraudulent practices, in setting up nuncupative wills, which have been the occasion of much perjury, (2) be it enacted by the authority aforesaid, That, from and after the aforesaid four and twentieth day of June, no nuncupative will shall be good, where the estate thereby bequeathed shall exceed the value of thirty pounds, that is not proved by the oaths of three witnesses, (at the least) that were present at the making thereof; (3) nor unless it be proved that the testator, at the time of pronouncing the same, did bid the persons present, or some of them, bear witness, that such was his will, or to that effect; (4) nor unless such nuncupative will were made in the time of the last sickness of the deceased, and in the house of his or their habitation or dwelling, or where he or she hath been resident for the space of ten days, or more, next before the making of such will, except where such person was surprised or taken sick, being from his own home, and died before he returned to the place of his or her dwelling.

XX. And be it further enacted, That after six months passed after the speaking of the pretended testamentary words, no testimony shall be received to prove any will nuncupative, except the said testimony, or the substance thereof, were committed to writing within six days after the making of the said will.

XXI. And be it further enacted, That no letters testamentary, or probate of any nuncupative will, shall pass the seal of any court, till fourteen days at the least after the decease of the testator be fully expired; (2) nor shall any nuncupative will be at any time received to be proved, unless process have first issued to call in the widow, or next of kindred to the deceased, to the end they may contest the same if they please.

XXII. And be it further enacted, That no will in writing, concerning any goods or chattels, or personal estate shall be re-

pealed, nor shall any clause, devise, or bequest, therein be altered or changed by any words, or will by word of mouth only, except the same be in the life of the testator committed to writing, and after the writing thereof read unto the testator, and allowed by him, and proved to be so done by three witnesses at the least.

XXIII. Provided always, That notwithstanding this act, any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his moveables, wages, and personal estate, as he or they might have done before the making of this act.

Soldiers' and mariners' wills excepted.

XXIV. And it is hereby declared, That nothing in this act shall extend to alter or change the jurisdiction or right of probate of wills concerning personal estates, but that the Prerogative Court of the Archbishop of Canterbury, and other ecclesiastical courts, and other courts having right to the probate of such wills, shall retain the same right and power as they had before, in every respect; subject nevertheless to the rules and directions of this act.

The jurisdiction of court saved.

XXV. And for the explaining one act of this present Parliament, intituled, "An Act for the better settling of intestates' estates," (2) be it declared by the authority aforesaid, That neither the said act, nor any thing therein contained, shall be construed to extend to the estates of feme covert that shall die intestate, but that their husbands may demand and have administration of their rights, credits, and other personal estates, and recover and enjoy the same, as they might have done before the making of the said act. Made perpetual by 1 Jac. 2. c. 17. s. 5.

22 and 23 C. 2. c. 10. husbands not compellable to make distribution of the personal estates of their wives.

9 Geo. 2. c. 36.

*An Act to restrain the disposition of Lands, whereby the same become unalienable.*

WHEREAS gifts or alienations of lands, tenements, or hereditaments, in Mortmain, are prohibited or restrained by Magna Charta, and divers other wholesome laws, as prejudicial to and against the common utility; nevertheless this public

Preamble.

After 24 June, 1736, no manors, lands, &c. nor money to be laid out in lands, to be given for charitable uses;

unless by deed indented, and executed before two witnesses 12 months before the death of the donor, and enrolled, &c.

The said limitations not to extend to purchases or transfers made for valuable considerations.

*mischief* has of late greatly increased by many large and improvident alienations or dispositions made by languishing or dying persons, or by other persons, to uses called Charitable uses, to take place after their deaths, to the disherison of their lawful heirs; for remedy whereof be it enacted by the King's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, That from and after the twenty-fourth day of June, which shall be in the year of our Lord one thousand seven hundred and thirty-six, no manors, lands, tenements, rents, advowsons, or other hereditaments, corporeal or incorporeal, whatsoever, nor any sum or sums of money, goods, chattels, stocks in the public funds, securities for money, or any other personal estate whatsoever, to be laid out or disposed of in the purchase of any lands, tenements, or hereditaments, shall be given, granted, aliened, limited, released, transferred, assigned, or appointed, or any ways conveyed or settled to or upon any person or persons, bodies politic or corporate, or otherwise, for any estate or interest whatsoever, or any ways charged or incumbered by any person or persons whatsoever, in trust or for the benefit of any charitable use<sup>s</sup> whatsoever; unless such gift, conveyance, appointment, or settlement of any such lands, tenements, or hereditaments, sum or sums of money, or personal estate (other than stocks in the public funds) be and be made by deed indented, sealed and delivered in the presence of two or more credible witnesses, twelve calendar months at least before the death of such donor or grantor (including the days of the execution and death) and be enrolled in his Majesty's high court of *Chancery*, within six calendar months next after the execution thereof; and unless such stocks be transferred in the public books usually kept for the transfer of stocks six calendar months at least before the death of such donor or grantor, (including the days of the transfer and death) and unless the same be made to take effect in possession for the charitable use intended, immediately from the making thereof, and be without any power of revocation, reservation, trust, condition, limitation, clause, or agreement whatsoever, for the benefit of the donor or grantor, or of any person or persons claiming under him.

II. Provided always, That nothing herein before mentioned relating to the sealing and delivering of any deed or deeds, twelve calendar months at least before the death of the grantor, or to the transfer of any stock six calendar months before the

death of the grantor or person making such transfer, shall extend, or be construed to extend, to any purchase of any estate or interest in lands, tenements, or hereditaments, or any transfer of any stock, to be made really and *bona fide* for a full and valuable consideration actually paid at or before the making such conveyance or transfer without fraud or collusion.

III. And be it further enacted by the authority aforesaid, That all gifts, grants, conveyances, appointments, assurances, transfers, and settlements whatsoever, of any lands, tenements, or other hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting or to affect any lands, tenements, or hereditaments, or of any stock, money, goods, chattels, or other personal estate, or securities for money to be laid out or disposed of in the purchase of any lands, tenements, or hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting or to affect the same, to or in trust for any charitable uses whatsoever, which shall at any time, from and after the said twenty-fourth day of June, one thousand seven hundred and thirty-six, be made in any other manner or form than by this act is directed and appointed, shall be absolutely, and to all intents and purposes, null and void.

Gifts, &c.  
made after 24  
June, 1736,  
otherwise than  
directed by this  
act, to be ab-  
solutely void.

IV. Provided always, That this act shall not extend, or be construed to extend, to make void the dispositions of any lands, tenements, or hereditaments, or of any personal estate to be laid out in the purchase of any lands, tenements, or hereditaments, which shall be made in any other manner or form than by this act is directed, to or in trust for either of the two universities within that part of Great Britain called England, or any of the colleges or houses of learning within either of the said universities, or to or in trust for the colleges of Eton, Winchester, or Westminster, or any or either of them, for the better support and maintenance of the scholars only upon the foundations of the said colleges of Eton, Winchester, and Westminster.

But not to pre-  
judice the two  
universities, or  
the colleges of  
Eton, Win-  
chester, or  
Westminster.

V. Provided nevertheless, and be it enacted by the authority aforesaid, That no such college or house of learning, which doth or shall hold or enjoy so many advowsons of ecclesiastical benefices as are or shall be equal in number to one moiety of the fellows or persons usually stiled or reputed as fellows, or, where there are or shall be no fellows or persons usually stiled or reputed as fellows, to one moiety of the students upon the foundation, whereof any such college or house of learning doth

No college to  
hold more ad-  
vowsons than  
shall be equal  
to one moiety  
of their fellows,  
&c.



or may by the present constitution of such college or house of learning consist, shall from and after the twenty-fourth day of June, one thousand seven hundred and thirty-six, be capable of purchasing, acquiring, receiving, taking, holding or enjoying any other advowsons of ecclesiastical benefices by any means whatsoever ; the advowsons of such ecclesiastical benefices as are annexed to, or given for the benefit or better support of, the headships of any of the said colleges or houses of learning, not being computed in the number of advowsons hereby limited.

This act not to extend to estates in Scotland.

VI. Provided always, That nothing in this act contained shall extend or be construed to extend to the disposition, grant, or settlement of any estate, real or personal, lying or being within that part of Great Britain called Scotland.

14 Geo. 2. c. 20.

29 Car. II. c. 3.

IX. *And whereas, by an act made in the twenty-ninth year of the reign of king Charles the second, intituled, An act for prevention of frauds and perjuries, amongst other things, it is enacted, That estates pur auter vie, whereof no devise should be made, should, in case there should be no special occupant thereof, go to the executors or administrators of the party that had the estate thereof by virtue of the grant; and should be assets in their hands : and whereas doubts have arisen, where no devise has been made of such estates, to whom the surplus of such estates, after the debts of such deceased owner thereof, are fully satisfied, shall belong ; be it enacted by the authority aforesaid, That such estates pur auter vie, in case there be no special occupant thereof, of which no devise shall have been made according to the said act for prevention of frauds and perjuries, or so much thereof as shall not have been so devised, shall go, be applied, and distributed, in the same manner as the personal estate of the testator or intestate.*

Surplus of estates pur auter vie how to pass, if not devised.



25 Geo. 2. c. 6.

*An Act for avoiding and putting an end to certain Doubts and questions relating to the Attestation of Wills and Codicils, concerning Real Estates in that Part of Great Britain called England, and in his Majesty's Colonies and Plantations in America.*

WHEREAS by an act made in the twenty-ninth year of the reign of his late Majesty King Charles the Second, intituled, "An act for prevention of frauds and perjuries," it is amongst other things enacted, that, from and after the twenty-fourth day of June, in the year of our Lord one thousand six hundred and seventy-seven, all devises and bequests of any lands or tenements devisable, either by force of the statute of wills, or by that statute, or by force of the custom of Kent, or the custom of any borough, or any other particular custom, shall be in writing, and signed by the party so devising the same, or by some other person in his presence, and by his express direction; and shall be attested and subscribed in the presence of the said devisor, by three or four credible witnesses, or else they shall be utterly void and of none effect, which hath been found to be a wise and good provision: but whereas doubts have arisen who are to be deemed legal witnesses within the intent of the said act; therefore, for avoiding the same, be it enacted by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, That if any person shall attest the execution of any will or codicil which shall be made after the twenty-fourth day of June, in the year of our Lord one thousand seven hundred and fifty-two, to whom any beneficial devise, legacy, estate, interest, gift, or appointment of or affecting any real or personal estate, other than and except charges on lands, tenements, or hereditaments, for payment of any debt or debts, shall be thereby given or made, such devise, legacy, estate, interest, gift, or appointment, shall, so far only as concerns such person attesting the execution of such will or codicil, or any person claiming under him, be utterly null and void; and such person shall be admitted as a witness to the execution of such

If a devisee or legatee under the will attests a will, the devise or legacy shall be void, and the attestation effectual.

If lands are charged with the payment of debts, the attestation of a creditors good, and he is a good witness to prove the execution.

will or codicil, within the intent of the said act; notwithstanding such devise, legacy, estate, interest, gift, or appointment mentioned in such will or codicil.

II. And be it further enacted by the authority aforesaid, That in case, by any will or codicil already made, or hereafter to be made, any lands, tenements, or hereditaments, are or shall be charged with any debt or debts, and any creditor whose debt is so charged hath attested, or shall attest the execution of such will or codicil, every such creditor, notwithstanding such charge, shall be admitted as a witness to the execution of such will or codicil, within the intent of the said act.

III. And be it further enacted by the authority aforesaid, That if any person hath attested the execution of any will or codicil already made, or shall attest the execution of any will or codicil which shall be made on or before the said twenty-fourth day of June, in the year of our Lord one thousand seven hundred and fifty-two, to whom any legacy or bequest is or shall be thereby given, whether charged upon lands, tenements, or hereditaments, or not; and such person, before he shall give his testimony concerning the execution of any such will or codicil, shall have been paid, or have accepted or released, or shall have refused to accept such legacy or bequest, upon tender made thereof, such person shall be admitted as a witness to the execution of such will or codicil, within the intent of the said act, notwithstanding such legacy or bequest.

IV. Provided always, and be it further enacted, That in case of such tender and refusal as aforesaid, such person shall in no wise be intitled to such legacy or bequest, but shall be for ever afterwards barred therefrom; and in case of such acceptance as aforesaid, such person shall retain to his own use the legacy or bequest which shall have been so paid, satisfied or accepted, notwithstanding such will or codicil shall afterwards be adjudged or determined to be void for want of due execution, or for any other cause or defect whatsoever.

V. And be it further enacted, That in case any such legatee as aforesaid, who hath attested the execution of any will or codicil already made, or shall attest the execution of any will or codicil which shall be made on or before the said twenty-fourth day of June, in the year of our Lord one thousand seven hundred and fifty-two, shall have died in the life-time of the testator, or before he shall have received or released the legacy or bequest so given to him as aforesaid, and before he shall have refused to receive such legacy or bequest, on tender

made thereof, such legatee shall be deemed a legal witness to the execution of such will or codicil, within the intent of the said act, notwithstanding such legacy or bequest.

VI. Provided always, That the credit of every such witness so attesting the execution of any will or codicil, in any of the cases in this act before-mentioned, and all circumstances relating thereto, shall be subject to the consideration and determination of the Court, and the jury, before whom any such witness shall be examined, or his testimony or attestation made use of; or of the Court of Equity, in which the testimony or attestation of any such witness shall be made use of; in like manner, to all intents and purposes, as the credit of witnesses in all other cases ought to be considered of and determined.

The credit of every witness, so attesting, is to be subject to the determination of the court and jury.

VII. And be it further enacted by the authority aforesaid, That no person to whom any beneficial estate, interest, gift or appointment, shall be given or made, which is hereby enacted to be null and void as aforesaid, or who shall have refused to receive any such legacy or bequest, on tender made as aforesaid, and who shall have been examined as a witness concerning the execution of such will or codicil, shall, after he shall have been so examined, demand or take possession of or receive any profits or benefit of or from any such estate, interest, gift, or appointment, so given or made to him, in or by any such will or codicil; or demand, receive, or accept from any person or persons whatsoever any such legacy or bequest, or any satisfaction or compensation for the same, in any manner or under any colour or pretence whatsoever.

VIII. Provided always, and be it enacted by the authority aforesaid, That this act, or any thing herein contained, shall not extend, or be construed to extend, to the case of any heir-at-law, or of any devisee, in a prior will, or codicil of the same testator, executed and attested according to the said recited act, or any person claiming under them respectively, who has been in quiet possession for the space of two years next preceding the sixth day of May, in the year of our Lord one thousand seven hundred and fifty-one, as to such lands, tenements, and hereditaments, whereof he has been in quiet possession as aforesaid; and also that this act, or any thing herein contained, shall not extend or be construed to extend, to any will or codicil, the validity or due execution whereof hath been contested in any suit in law or equity, commenced by the heir of such deviser, or the devisee in any such prior will or codicil, for recovering the lands, tenements, or hereditaments, mentioned to be devised in any will or codicil so contested, or

any part thereof, or for obtaining any other judgment or decree relative thereto, on or before the said sixth day of May, in the year of our Lord one thousand seven hundred and fifty-one, and which has been already determined in favour of such heir-at-law, or devisee, in such prior will or codicil, or any person claiming under them respectively, or which is still depending, and has been prosecuted with due diligence; but the validity of every such will or codicil, and the competency of the witnesses thereto, shall be adjudged and determined in the same manner, to all intents and purposes, as if this act had never been made; any thing hereinbefore contained to the contrary thereof in any wise notwithstanding.

IX. Provided always nevertheless, and it is hereby declared, That no possession of any heir-at-law, or devisee, in such prior will or codicil as aforesaid, or of any person claiming under them respectively, which is consistent with, or may be warranted by or under any will or codicil, attested according to the true intent and meaning of this act, or where the estate descended or might have descended to such heir-at-law, till a future or executory devise, by virtue of any will or codicil attested according to this act, should or might take effect shall be deemed to be a possession within the intent and meaning of the clause herein last before contained.

X. And whereas in some of the British colonies or plantations in America, the said act of the twenty-ninth year of the reign of King Charles the Second, has been received for law, or acts of assembly have been made, whereby the attestation and subscription of witnesses to devises of lands, tenements, and hereditaments, have been required: therefore, to prevent and avoid doubts which may arise in the said colonies, or plantations, in relation to the attestation of such devises of lands, tenements, and hereditaments, be it enacted by the authority aforesaid, That this act, and every clause, matter, and thing therein contained, shall extend to such of the said colonies and plantations, where the said act of the twenty-ninth year of the reign of King Charles the Second, is by act of assembly made, or by usage received as law, or where, by act of assembly or usage, the attestation and subscription of a witness or witnesses are made necessary to devises of lands, tenements, or hereditaments; and shall have the same force and effect in the construction of or for the avoiding of doubts upon the said acts of assembly, and laws of the said colonies and plantations, as the same ought to have in the construction of or for the avoiding of doubts upon the said act of the twenty-

ninth year of the reign of King Charles the Second in England.

XI. Provided always, That as to cases arising in any of the said colonies or plantations in America, no such devise, legacy, or bequest as aforesaid, shall be made null and void, by virtue of this act, unless the will or codicil, whereby such devise, legacy, or bequest shall be given, shall be made after the first day of March, which shall be in the year of our Lord one thousand seven hundred and fifty-three.

39 & 40 Geo. 3. c. 98.

*An Act to restrain all Trusts and Directions in Deeds or Wills, whereby the Profits or Produce of Real or Personal Estate shall be accumulated; and the beneficial Enjoyment thereof postponed beyond the Time therein limited.*

[28th July, 1800.]

WHEREAS it is expedient that all dispositions of real or personal estates, whereby the profits and produce thereof are directed to be accumulated, and the beneficial enjoyment thereof is postponed, should be made subject to the restrictions hereinafter contained : may it therefore please your Majesty, that it may be enacted ; and be it enacted by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons in Parliament assembled, and by the authority of the same, that no person or persons shall, after the passing of this act, by any deed or deeds, surrender or surrenders, will, codicil, or otherwise howsoever, settle or dispose of any real or personal property, so and in such manner that the rents, issues, profits or produce thereof shall be wholly or partially accumulated for any longer term than the life or lives of any such grantor or grantors, settlor or settlors, or the term of twenty-years from the death of any such grantor, settlor, devisor or testator, or during the minority or respective minorities of any person or persons who shall be living, or *en ventre sa mere* at the time of the death of such grantor, devisor or testator, or during the minority or respective minorities only of any person or persons who, under the uses or trusts of the deed, surrender,

Preamble.

No person by deed or will, &c. shall settle or dispose of any real or personal property, in such manner that the rents or produce shall be accumulated for a longer term than herein mentioned, and any other direction shall be void, and the rents go to the persons entitled thereto.

will, or other assurances, directing such accumulations, would, for the time being, if of full age, be entitled unto the rents, issues, and profits, or the interest, dividends, or annual produce so directed to be accumulated; and in every case where any accumulation shall be directed otherwise than as aforesaid, such direction shall be null and void, and the rents, issues, profits and produce of such property so directed to be accumulated, shall, so long as the same shall be directed to be accumulated contrary to the provisions of this act, go to and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed.

Nothing herein to extend to any provision for payment of debts or for raising portions for children, or touching the produce of timber.

II. Provided always, and be it enacted, That nothing in this act contained shall extend to any provision for payment of debts of any grantor, settlor or deviser, or other person or persons, or to any provision for raising portions for any child or children of any grantor, settlor, or deviser, or any child or children of any person taking any interest under any such conveyance, settlement, or devise, or to any direction touching the produce of timber or wood upon any lands or tenements, but that all such provisions and directions shall and may be made and given as if this act had not passed.

Nor to any disposition of heritable property in Scotland.

III. Provided also, and be it enacted, That nothing in this act contained shall extend to any disposition respecting heritable property within that part of *Great Britain* called *Scotland*.

When restrictions shall take effect with respect to wills made before the passing of this act.

IV. Provided also, and be it enacted, That the restrictions in this act contained shall take effect and be in force with respect to wills and testaments made and executed before the passing of this act, in such cases only where the deviser or testator shall be living, and of sound and disposing mind, after the expiration of twelve calendar months, from the passing of this act.

## II. STAMP DUTIES.

*By the Statute 55 Geo. 3. c. 184. the Stamp Duties imposed by the 48 Geo. 3. c. 149., the 44 Geo. 3. c. 98., and the 45 Geo. 3. c. 28., are repealed, and the following Stamp Duties are imposed :*

PROBATE of a Will, and Letters of Administration with a Will annexed.	Duty.
	<u>£ s. d.</u>
Where the estate and effects for or in respect of which such probate or letters of administration shall be granted <i>exclusive of what the deceased shall have been possessed of or entitled to as a trustee for any other person or persons, and not beneficially</i> , shall be	
above the value of 20 <i>l.</i> and under the value of 100 <i>l.</i> . . . . .	0 10 0
of the value of 100 <i>l.</i> and under the value of 200 <i>l.</i> . . . . .	2 0 0
of the value of 200 <i>l.</i> and under the value of 300 <i>l.</i> . . . . .	5 0 0
of the value of 300 <i>l.</i> and under the value of 450 <i>l.</i> . . . . .	8 0 0
of the value of 450 <i>l.</i> and under the value of 600 <i>l.</i> . . . . .	11 0 0
of the value of 600 <i>l.</i> and under the value of 800 <i>l.</i> . . . . .	15 0 0
of the value of 8,00 <i>l.</i> and under the value of 1,000 <i>l.</i> . . . . .	22 0 0
of the value of 1,000 <i>l.</i> and under the value of 1,500 <i>l.</i> . . . . .	30 0 0



	Duty.		
	£	s.	d.
of the value of 1,500 <i>l.</i> and under the value of 2,000 <i>l.</i> . . . . .	40	0	0
of the value of 2,000 <i>l.</i> and under the value of 3,000 <i>l.</i> . . . . .	50	0	0
of the value of 3,000 <i>l.</i> and under the value of 4,000 <i>l.</i> . . . . .	60	0	0
of the value of 4,000 <i>l.</i> and under the value of 5,000 <i>l.</i> . . . . .	80	0	0
of the value of 5,000 <i>l.</i> and under the value of 6,000 <i>l.</i> . . . . .	100	0	0
of the value of 6,000 <i>l.</i> and under the value of 7,000 <i>l.</i> . . . . .	120	0	0
of the value of 7,000 <i>l.</i> and under the value of 8,000 <i>l.</i> . . . . .	140	0	0
of the value of 8,000 <i>l.</i> and under the value of 9,000 <i>l.</i> . . . . .	160	0	0
of the value of 9,000 <i>l.</i> and under the value of 10,000 <i>l.</i> . . . . .	180	0	0
of the value of 10,000 <i>l.</i> and under the value of 15,000 <i>l.</i> . . . . .	200	0	0
of the value of 12,000 <i>l.</i> and under the value of 14,000 <i>l.</i> . . . . .	220	0	0
of the value of 14,000 <i>l.</i> and under the value of 16,000 <i>l.</i> . . . . .	250	0	0
of the value of 16,000 <i>l.</i> and under the value of 18,000 <i>l.</i> . . . . .	280	0	0
of the value of 18,000 <i>l.</i> and under the value of 20,000 <i>l.</i> . . . . .	310	0	0
of the value of 20,000 <i>l.</i> and under the value of 25,000 <i>l.</i> . . . . .	350	0	0
of the value of 25,000 <i>l.</i> and under the value of 30,000 <i>l.</i> . . . . .	400	0	0
of the value of 30,000 <i>l.</i> and under the value of 35,000 <i>l.</i> . . . . .	450	0	0
of the value of 35,000 <i>l.</i> and under the value of 40,000 <i>l.</i> . . . . .	525	0	0
of the value of 40,000 <i>l.</i> and under the value of 45,000 <i>l.</i> . . . . .	600	0	0
of the value of 45,000 <i>l.</i> and under the value of 50,000 <i>l.</i> . . . . .	675	0	0
of the value of 50,000 <i>l.</i> and under the value of 60,000 <i>l.</i> . . . . .	750	0	0

	Duty.		
of the value of 60,000 <i>l.</i> and under the value of 70,000 <i>l.</i> . . . . .	900	0	0
of the value of 70,000 <i>l.</i> and under the value of 80,000 <i>l.</i> . . . . .	1,050	0	0
of the value of 80,000 <i>l.</i> and under the value of 90,000 <i>l.</i> . . . . .	1,200	0	0
of the value of 90,000 <i>l.</i> and under the value of 100,000 <i>l.</i> . . . . .	1,350	0	0
of the value of 100,000 <i>l.</i> and under the value of 120,000 <i>l.</i> . . . . .	1,500	0	0
of the value of 120,000 <i>l.</i> and under the value of 140,000 <i>l.</i> . . . . .	1,800	0	0
of the value of 140,000 <i>l.</i> and under the value of 160,000 <i>l.</i> . . . . .	2,100	0	0
of the value of 160,000 <i>l.</i> and under the value of 180,000 <i>l.</i> . . . . .	2,400	0	0
of the value of 180,000 <i>l.</i> and under the value of 200,000 <i>l.</i> . . . . .	2,700	0	0
of the value of 200,000 <i>l.</i> and under the value of 250,000 <i>l.</i> . . . . .	3,000	0	0
of the value of 250,000 <i>l.</i> and under the value of 300,000 <i>l.</i> . . . . .	3,750	0	0
of the value of 300,000 <i>l.</i> and under the value of 350,000 <i>l.</i> . . . . .	4,500	0	0
of the value of 350,000 <i>l.</i> and under the value of 400,000 <i>l.</i> . . . . .	5,250	0	0
of the value of 400,000 <i>l.</i> and under the value of 500,000 <i>l.</i> . . . . .	6,000	0	0
of the value of 500,000 <i>l.</i> and under the value of 600,000 <i>l.</i> . . . . .	7,500	0	0
of the value of 600,000 <i>l.</i> and under the value of 700,000 <i>l.</i> . . . . .	9,000	0	0
of the value of 700,000 <i>l.</i> and under the value of 800,000 <i>l.</i> . . . . .	10,500	0	0
of the value of 800,000 <i>l.</i> and under the value of 900,000 <i>l.</i> . . . . .	12,000	0	0
of the value of 900,000 <i>l.</i> and under the value of 1,000,000 <i>l.</i> . . . . .	13,500	0	0
of the value of 1,000,000 <i>l.</i> and upwards . . . . .	15,000	0	0

*Letters of Administration without a Will annexed.*

Where the estate and effects for or in respect of which such letters of administration shall be granted *exclusive of what the deceased shall have been possessed of or entitled to as a trustee for any other person or persons, and not beneficially,* shall be

	Duty.
	£. s. d.
above the value of 20 <i>l.</i> and under the value of 50 <i>l.</i> . . . . .	0 10 0
of the value of 50 <i>l.</i> and under the value of 100 <i>l.</i> . . . . .	1 0 0
of the value of 100 <i>l.</i> and under the value of 200 <i>l.</i> . . . . .	3 0 0
of the value of 200 <i>l.</i> and under the value of 300 <i>l.</i> . . . . .	8 0 0
of the value of 300 <i>l.</i> and under the value of 450 <i>l.</i> . . . . .	11 0 0
of the value of 450 <i>l.</i> and under the value of 600 <i>l.</i> . . . . .	15 0 0
of the value of 600 <i>l.</i> and under the value of 800 <i>l.</i> . . . . .	22 0 0
of the value of 800 <i>l.</i> and under the value of 1,000 <i>l.</i> . . . . .	30 0 0
of the value of 1,000 <i>l.</i> and under the value of 1,500 <i>l.</i> . . . . .	45 0 0
of the value of 1,500 <i>l.</i> and under the value of 2,000 <i>l.</i> . . . . .	60 0 0
of the value of 2,000 <i>l.</i> and under the value of 3,000 <i>l.</i> . . . . .	75 0 0
of the value of 3,000 <i>l.</i> and under the value of 4,000 <i>l.</i> . . . . .	90 0 0
of the value of 4,000 <i>l.</i> and under the value of 5,000 <i>l.</i> . . . . .	120 0 0
of the value of 5,000 <i>l.</i> and under the value of 6,000 <i>l.</i> . . . . .	150 0 0
of the value of 6,000 <i>l.</i> and under the value of 7,000 <i>l.</i> . . . . .	180 0 0
of the value of 7,000 <i>l.</i> and under the value of 8,000 <i>l.</i> . . . . .	210 0 0

	Duty.		
	£.	s.	d.
of the value of 8,000 <i>l.</i> and under the value of 9,000 <i>l.</i> . . . . .	240	0	0
of the value of 9,000 <i>l.</i> and under the value of 10,000 <i>l.</i> . . . . .	270	0	0
of the value of 15,000 <i>l.</i> and under the value of 12,000 <i>l.</i> . . . . .	300	0	0
of the value of 12,000 <i>l.</i> and under the value of 14,000 <i>l.</i> . . . . .	330	0	0
of the value of 14,000 <i>l.</i> and under the value of 16,000 <i>l.</i> . . . . .	375	0	0
of the value of 16,000 <i>l.</i> and under the value of 18,000 <i>l.</i> . . . . .	420	0	0
of the value of 18,000 <i>l.</i> and under the value of 20,000 <i>l.</i> . . . . .	465	0	0
of the value of 20,000 <i>l.</i> and under the value of 25,000 <i>l.</i> . . . . .	525	0	0
of the value of 25,000 <i>l.</i> and under the value of 30,000 <i>l.</i> . . . . .	600	0	0
of the value of 30,000 <i>l.</i> and under the value of 35,000 <i>l.</i> . . . . .	675	0	0
of the value of 35,000 <i>l.</i> and under the value of 40,000 <i>l.</i> . . . . .	785	0	0
of the value of 40,000 <i>l.</i> and under the value of 45,000 <i>l.</i> . . . . .	900	0	0
of the value of 45,000 <i>l.</i> and under the value of 50,000 <i>l.</i> . . . . .	1,010	0	0
of the value of 50,000 <i>l.</i> and under the value of 60,000 <i>l.</i> . . . . .	1,125	0	0
of the value of 60,000 <i>l.</i> and under the value of 70,000 <i>l.</i> . . . . .	1,350	0	0
of the value of 70,000 <i>l.</i> and under the value of 80,000 <i>l.</i> . . . . .	1,575	0	0
of the value of 80,000 <i>l.</i> and under the value of 90,000 <i>l.</i> . . . . .	1,800	0	0
of the value of 90,000 <i>l.</i> and under the value of 100,000 <i>l.</i> . . . . .	2,025	0	0
of the value of 100,000 <i>l.</i> and under the value of 120,000 <i>l.</i> . . . . .	2,250	0	0
of the value of 120,000 <i>l.</i> and under the value of 140,000 <i>l.</i> . . . . .	2,700	0	0
of the value of 140,000 <i>l.</i> and under the value of 160,000 <i>l.</i> . . . . .	3,150	0	0

	Duty.		
	£.	s.	d.
of the value of 160,000 <i>l.</i> and under the value of 180,000 <i>l.</i> . . . . .	3,600	0	0
of the value of 180,000 <i>l.</i> and under the value of 200,000 <i>l.</i> . . . . .	4,050	0	0
of the value of 200,000 <i>l.</i> and under the value of 250,000 <i>l.</i> . . . . .	4,500	0	0
of the value of 250,000 <i>l.</i> and under the value of 300,000 <i>l.</i> . . . . .	5,625	0	0
of the value of 300,000 <i>l.</i> and under the value of 350,000 <i>l.</i> . . . . .	6,750	0	0
of the value of 350,000 <i>l.</i> and under the value of 400,000 <i>l.</i> . . . . .	7,875	0	0
of the value of 400,000 <i>l.</i> and under the value of 500,000 <i>l.</i> . . . . .	9,000	0	0
of the value of 500,000 <i>l.</i> and under the value of 600,000 <i>l.</i> . . . . .	11,250	0	0
of the value of 600,000 <i>l.</i> and under the value of 700,000 <i>l.</i> . . . . .	13,500	0	0
of the value of 700,000 <i>l.</i> and under the value of 800,000 <i>l.</i> . . . . .	15,750	0	0
of the value of 800,000 <i>l.</i> and under the value of 900,000 <i>l.</i> . . . . .	18,000	0	0
of the value of 900,000 <i>l.</i> and under the value of 1,000,000 <i>l.</i> . . . . .	20,250	0	0
of the value of 1,000,000 <i>l.</i> and upwards . . . . .	22,500	0	0

*Exemption from all Stamp Duties.*

*Probate of a will, letters of administration, and inventory of the effects of any common seaman, marine, or soldier, who shall be slain or die in the service of His Majesty, his heirs or successors.*

**LEGACIES and SUCCESSIONS to personal or moveable estate upon intestacy.**

1. *Where the testator, testatrix, or intestate died before or upon the 5th day of April, 1805.*

For every legacy, specific or pecuniary, or of any other description, of the amount or value of 20*l.* or upwards, given by any will or testamentary in-

Duty.

£. s. d.

strument of any person who died before or upon the 5th day of April, 1805, out of his or her personal or moveable estate, and which shall be paid, delivered, retained, satisfied, or discharged, after the 31st day of August, 1815 :

Also for the clear residue (when devolving to one person) and for every share of the clear residue (when devolving to two or more persons) of the personal or moveable estate of any person who died before or upon the 5th day of April, 1805, (after deducting debts, funeral expenses, legacies, and other charges first payable thereout), whether the title to such residue, or any share thereof, shall accrue by virtue of any testamentary disposition, or upon a partial or total intestacy ; where such residue, or share of residue, shall be of the amount or value of 20*l.* or upwards, and where the same shall be paid, delivered, retained, satisfied, or discharged, after the thirty-first day of August, 1815 :

Where any such legacy or residue, or share of such residue, shall have been given, or have devolved, to or for the benefit of a *brother or sister of the deceased, or any descendant of a brother or sister of the deceased* ; a duty at and after the rate of two pounds and ten shillings *per centum*, *per cent.*  
on the amount or value thereof - 2 10 0

Where any such legacy or residue, or share of such residue, shall have been given, or have devolved, to or for the benefit of a *brother or sister of the father or mother of the deceased, or any descendant of a brother or sister of the father or mother of the deceased* ; a duty at and after the rate of four pounds *per centum* on the amount or *per cent.*  
value thereof . . . - 4 0 0

Where any such legacy, or residue, or share of such residue, shall have been given, or

Duty.

£. s. d.

have devolved, to or for the benefit of a brother or sister of a grandfather or grandmother of the deceased, or any descendant of a brother or sister of a grandfather or grandmother of the deceased; a duty at and after the rate of five pounds *per centum* on the amount or value thereof

*per cent.*  
5 0 0

And where any such legacy, or residue or share of such residue, shall have been given, or have devolved, to or for the benefit of any person in any other degree of collateral consanguinity to the deceased than is above described, or to or for the benefit of any stranger in blood to the deceased; a duty at and after the rate of eight pounds *per centum* on the amount or value thereof -

*per cent.*  
8 0 0

II. *Where the testator, testatrix, or intestate, shall have died after the 5th day of April, 1805.*

For every legacy, specific or pecuniary, or of any other description, of the amount or value of 20*l.* or upwards, given by any will or testamentary instrument of any person, who shall have died after the 5th day of April, 1805, either out of his or her personal or moveable estate, or out of or charged upon his or her real or heritable estate, or out of any monies to arise by the sale, mortgage or other disposition of his or her real or heritable estate, or any part thereof, and which shall be paid, delivered, retained, satisfied, or discharged, after the 31st day of August, 1815 :

Also, for the clear residue (when devolving to one person) and for every share of the clear residue (when devolving to two or more persons) of the personal or moveable estate of any person, who shall have died after the 5th day of April, 1805, (after deducting debts, funeral expenses, legacies, and other charges first payable thereout) whether the



	Duty.
	£. s. d.
title to such residue, or any share thereof, shall accrue by virtue of any testamentary disposition, or upon a partial or total intestacy; where such residue, or share of residue, shall be of the amount or value of 20 <i>l.</i> or upwards, and where the same shall be paid, delivered, retained, satisfied or discharged after the 31st day of August, 1815:	
And also for the clear residue (when given to one person) and for every share of the clear residue (when given to two or more persons) of the monies to arise from the sale, mortgage, or other disposition of any real or heritable estate, directed to be sold, mortgaged, or otherwise disposed of, by any will or testamentary instrument, of any person, who shall have died after the 5th day of April, 1805, (after deducting debts, funeral expenses, legacies, and other charges first made payable thereout, if any,) where such residue, or share of residue, shall amount to 20 <i>l.</i> or upwards, and where the same shall be paid, retained, or discharged, after the 21st day of August, 1815:	
Where any such legacy or residue, or any share of such residue, shall have been given, or have devolved, to or for the benefit of <i>a child of the deceased, or any descendant of a child of the deceased, or to or for the benefit of the father or mother, or any lineal ancestor, of the deceased;</i> a duty at and after the rate of one pound <i>per centum</i> on the amount or value thereof	<i>per cent.</i> 1 0 0
Where any such legacy or residue, or any share of such residue, shall have been given, or have devolved, to or for the benefit of <i>a brother or sister of the deceased, or any descendant of a brother or sister of the deceased;</i> a duty at and after the rate of three pounds <i>per centum</i> on the amount or value thereof	<i>per cent.</i> 3 0 0

## Duty.

£. s. d.

Where any such legacy or residue, or any share of such residue, shall have been given, or have devolved, to or for the benefit of *a brother or sister of the father or mother of the deceased, or any descendant of a brother or sister of the father or mother of the deceased*; a duty at and after the rate of five pounds *per centum* on the amount or value thereof - - - *per cent.*  
5 0 0

Where any such legacy or residue, or any share of such residue, shall have been given, or have devolved, to<sup>a</sup> or for the benefit of *a brother or sister of a grandfather or grandmother of the deceased, or any descendant of a brother or sister of a grandfather or grandmother of the deceased*; a duty at and after the rate of six pounds *per centum* on the amount or value thereof - - - *per cent.*  
6 0 0

And where any such legacy or residue, or any share of such residue, shall have been given, or have devolved, to or for the benefit of any person, *in any other degree of collateral consanguinity to the deceased* than is above described, or to or for the benefit of *any stranger in blood to the deceased*; a duty at and after the rate of ten pounds *per centum* on the amount or value thereof - - - *per cent.*  
10 0 0

And all gifts of annuities, or by way of annuity, or of any other partial benefit or interest, out of any such estate or effects as aforesaid, shall be deemed legacies within the intent and meaning of this schedule.

And where any legatee shall take two or more distinct legacies or benefits under any will or testamentary instrument, which shall together be of the amount or value of 20*l.*, each shall be charged with duty, though each or either may be separately under that amount or value.

*Exemptions.*

*Legacies and residues, or shares of residue, of any such estate or effects as aforesaid, given or devolving to or for the benefit of the husband or wife of the deceased, or to or for the benefit of any of the Royal Family.*

*And all legacies which were exempted from duty by the act passed in the 39th year of his Majesty's reign, c. 73, for exempting certain specific legacies given to bodies corporate, or other public bodies, from the payment of duty.*

By sect. 37. it is enacted, That from and after the thirty-first day of *August* one thousand eight-hundred and fifteen, if any person shall take possession of, and in any manner administer, any part of the personal estate and effects of any person deceased, without obtaining probate of the will or letters of administration of the estate and effects of the deceased, within six calendar months after his or her decease, or within two calendar months after the termination of any suit or dispute respecting the will or the right to letters of administration, if there shall be any such, which shall not be ended within four calendar months after the death of the deceased; every person so offending shall forfeit the sum of one hundred pounds, and also a further sum, at and after the rate of ten pounds *per centum* on the amount of the stamp duty payable on the probate of the will or letters of administration of the estate and effects of the deceased.

Sect. 38. That from and after the expiration of three calendar months from the passing of this act, no ecclesiastical court or person shall grant probate of the will or letters of administration of the estate and effects of any person deceased without first requiring and receiving from the person or persons, applying for the probate or letters of administration, or from some other competent person or persons, an affidavit, or solemn affirmation in the case of Quakers, that the estate and effects of the deceased, for or in respect of which the probate or letters of administration is or are to be granted, exclusive of what the deceased shall have been possessed of or entitled to as a trustee for any other person or persons, and not beneficially, but including the leasehold estates for years of the deceased, whether absolute or determinable on lives, if any, and without deducting any thing on account of the debts due and owing from the deceased, are under the value of a certain sum to be

therein specified, to the best of the deponent's or affirmant's knowledge, information, and belief, in order that the proper and full stamp duty may be paid on such probate or letters of administration; which affidavit or affirmation shall be made before the surrogate or other person who shall administer the usual oath for the due administration of the estate and effects of the deceased.

Sect. 39. That every such affidavit or affirmation, shall be exempt from stamp duty, and shall be transmitted to the said commissioners of stamps together with the copy of the will, or extract or account of the letters of administration to which it shall relate, by the registrar or other officer of the Court, whose duty it shall be to transmit copies of wills, and extracts or accounts of letters of administration, to the said commissioners, for the better collection of the duties on legacies and successions to personal estate upon intestacy; and if any registrar or other officer whose duty it shall be shall neglect to transmit such affidavit or affirmation to the said commissioners of stamps, as hereby directed, every person so offending shall forfeit the sum of fifty pounds.

Sect. 40. That from and after the passing of this act, where any person, on applying for the probate of a will or letters of administration, shall have estimated the estate and effects of the deceased to be of greater value than the same shall have afterwards proved to be, and shall in consequence have paid too high a stamp duty thereon, if such person shall produce the probate or letters of administration to the said commissioners of stamps within six calendar months after the true value of the estate and effects shall have been ascertained, and it shall be discovered that too high a duty was first paid on the probate or letters of administration, and shall deliver to them a particular inventory and account and valuation of the estate and effects of the deceased, verified by an affidavit, or solemn affirmation in the case of Quakers; and if it should thereupon satisfactorily appear to the said commissioners, that a greater stamp duty was paid on the probate or letters of administration than the law required, it shall be lawful for the said commissioners to cancel and expunge the stamp on the probate or letters of administration, and to substitute another stamp for denoting the duty which ought to have been paid thereon, and to make an allowance for the difference between them, as in the cases of spoiled stamps; or if the difference be considerable, to repay the same in money, at the discretion of the said commissioners.

**Sect. 41.** That from and after the passing of this act, where any person, on applying for the probate of a will or letters of administration, shall have estimated the estate and effects of the deceased to be of less value than the same shall have afterwards proved to be, and shall in consequence have paid too little stamp duty thereon, it shall be lawful for the said commissioners of stamps, on delivery to them of an affidavit or solemn affirmation of the value of the estate and effects of the deceased, to cause the probate or letters of administration to be duly stamped, on payment of the full duty which ought to have been originally paid thereon in respect of such value, and of the further sum or penalty payable by law for stamping deeds after the execution thereof, without any deduction or allowance of the stamp duty originally paid on such probate or letters of administration: provided always, that if the application shall be made within six calendar months after the true value of the estate and effects shall be ascertained, and it shall be discovered that too little duty was at first paid on the probate or letters of administration; and if it shall appear by affidavit or solemn affirmation, to the satisfaction of the said commissioners, that such duty was paid in consequence of any mistake or misapprehension, or of its not being known at the time that some particular part of the estate and effects belonged to the deceased, and without any intention of fraud, or to delay the payment of the full and proper duty, then it shall be lawful for the said commissioners to remit the before-mentioned penalty, and to cause the probate or letters of administration to be duly stamped, on payment only of the sum which shall be wanting to make up the duty which ought to have been at first paid thereon.

**Sect. 42.** That in cases of letters of administration on which too little stamp duty shall have been paid at first, the said commissioners of stamps shall not cause the same to be duly stamped in the manner aforesaid, until the administrator shall have given such security to the ecclesiastical court or ordinary by whom the letters of administration shall have been granted, as ought by law to have been given on the granting thereof, in case the full value of the estate and effects of the deceased had been then ascertained, and also that the said commissioners of stamps shall yearly, or oftener, transmit an account of the probates and letters of administration, upon which the stamps shall have been rectified in pursuance of this act, to the several ecclesiastical courts by which the same shall have been granted, together with the value of the estate and effects of the deceased; upon which such rectification shall have proceeded.

Sect. 43. That where too little duty shall have been paid on any probate or letters of administration, in consequence of any mistake or misapprehension, or of its not being known at the time that some particular part of the estate and effects belonged to the deceased, if any executor or administrator acting under such probate or letters of administration shall not, within six calendar months after the passing of this act, or after the discovery of the mistake or misapprehension, or of any estate or effects not known at the time to have belonged to the deceased, apply to the said commissioners of stamps, and pay what shall be wanting to make up the duty which ought to have been paid at first on such probate or letters of administration, he or she shall forfeit the sum of one hundred pounds, and also a further sum, at and after the rate of ten pounds *per centum* on the amount of the sum wanting to make up the proper duty.

Sect. 44. That, from and after the expiration of three calendar months from the passing of this act, it shall not be lawful for any ecclesiastical court or person to call in and revoke, or to accept the surrender of any probate or letters of administration, on the ground only of too high or too low a stamp duty having been paid thereon, as heretofore hath been practised; and if any ecclesiastical court or person shall so do, the commissioners of stamps shall not make any allowance whatever for the stamp duty on the probate or letters of administration which shall be so annulled.

Sect. 45. As it has happened in the case of letters of administration on which the proper stamp duty hath not been paid at first, that certain debts, chattels real or other effects, due or belonging to the deceased, have been found to be of such great value, that the administrator hath not been possessed of money sufficient either of his own or of the deceased to pay the requisite stamp duty, in order to render such letters of administration available for the recovery thereof by law; and whereas the like may occur again, and it may also happen that executors or persons entitled to take out letters of administration may, before obtaining probate of the will or letters of administration of the estate and effects of the deceased, find some considerable part or parts of the estate and effects of the deceased so circumstanced as not to be immediately got possession of, and may not have money sufficient either of their own or of the deceased to pay the stamp duty on the probate or letters of administration which it shall be necessary to obtain; it is enacted, That, from and after the passing of this act, it shall be

lawful for the said commissioners of stamps, on satisfactory proof of the facts by affidavit or solemn affirmation, in any such case as aforesaid which may appear to them to require relief, to cause the probate or letters of administration to be duly stamped, for denoting the duty payable, or which ought originally to have been paid thereon, and to give credit for the duty, either upon payment of the before-mentioned penalty, or without, in cases of probates or letters of administration already obtained, and upon which too little duty shall have been paid, and either with or without allowance of the stamp duty already paid thereon, as the case may require, under the provisions of this act; provided in all such cases of credit that security be first given by the executors or administrators, together with two or more sufficient sureties to be approved of by the said commissioners, by a bond to his Majesty, his heirs or successors, in double the amount of the duty, for the due and full payment of the sum for which credit shall be given, within six calendar months, or any less period, and of the interest for the same, at the rate of ten pounds *per centum per annum*, from the expiration of such period until payment thereof, in case of any default of payment at the time appointed; and such probate or letters of administration being duly stamped in the manner aforesaid, shall be as valid and available as if the proper duty had been at first paid thereon, and the same had been stamped accordingly.

Sect. 46. Provided that, if at the expiration of the time to be allowed for the payment of the duty on such probate or letters of administration, it shall appear to the satisfaction of the said commissioners, that the executor or administrator to whom such credit shall be given as aforesaid shall not have recovered effects of the deceased to an amount sufficient for the payment of the duty, it shall be lawful for the said commissioners to give such further time for the payment thereof, and upon such terms and conditions, as they shall think expedient.

Sect. 47. Provided also, that the probate or letters of administration, so to be stamped on credit as aforesaid, shall be deposited with the said commissioners of stamps, and shall not be delivered up to the executor or administrator until payment of the duty, together with such interest as aforesaid, if any shall become due: but the same shall nevertheless be produced in evidence by some officer of the commissioners of stamps, at the expense of the executor or administrator, as occasion shall require.

Sect. 48. That the duty for which credit shall be given as



aforesaid shall be a debt to his Majesty, his heirs or successors, from the personal estate of the deceased, and shall be paid in preference to, and before any other debt whatsoever due from the same estate; and if any executor or administrator of the estate of the deceased shall pay any other debt in preference thereto, he or she shall not only be charged with and be liable to pay the duty out of his or her own estate, but shall also forfeit the sum of five hundred pounds.

Sect. 49. That if, before payment of the duty for which credit shall be given in any such case as aforesaid, it shall become necessary to take out letters of administration *de bonis non* of the deceased, it shall also be lawful for the said commissioners to cause such letters of administration *de bonis non* to be duly stamped with the particular stamp provided to be used on letters of administration of that kind, for denoting the payment of the duty in respect of the effects of the deceased, on some prior probate or letters of administration of the same effects, in such and the same manner as if the duty had been actually paid, upon having letters of administration *de bonis non* deposited with the said commissioners, and upon having such further security for the payment of the duty, as they shall think expedient; and such letters of administration shall be as valid and available as if the duty for which credit shall be given had been paid.

Sect. 50. In regard to probate of wills and letters of administration, That where any part of the personal estate which the deceased was possessed of or entitled to shall be alleged to have been trust property, if the person or persons who shall be required to make any affidavit or affirmation relating thereto, conformably to the provisions of the said act of the forty-eighth year of his Majesty's reign, shall reside out of *England*, such affidavit or affirmation shall and may be made before any person duly commissioned to take affidavits by the Court of Session or Court of Exchequer in *Scotland*, or before one of his Majesty's Justices of the Peace in *Scotland*, or before a master in Chancery ordinary or extraordinary in *Ireland*, or before any judge or civil magistrate of any other country or place where the party or parties shall happen to reside; and every such affidavit or affirmation shall be as effectual as if the same had been made before a master in Chancery in *England*, pursuant to the directions of the said last-mentioned act.

Sect. 51. Provided, That where it shall be proved by oath or proper vouchers, to the satisfaction of the said commissioners of stamps, that an executor or administrator hath paid debts

due and owing from the deceased, and payable by law out of his or her personal or moveable estate, to such an amount as being deducted from the amount or value of the estate and effects of the deceased, for or in respect of which a probate or letters of administration, or a compensation of a testament, testamentary or dative, shall have been granted after the thirty-first day of *August* one thousand eight hundred and fifteen, or which shall be included in any inventory exhibited and recorded in a commissary Court in *Scotland* as the law requires, after that day, shall reduce the same to a sum which, if it had been the whole gross amount or value of such estate and effects, would have occasioned a less stamp duty to be paid on such probate or letters of administration, or confirmation or inventory, than shall have been actually paid thereon under and by virtue of this act, it shall be lawful for the said commissioners to return the difference, provided the same shall be claimed within three years after the date of such probate or letters of administration or confirmation, or the recording of such confirmation as aforesaid: but where, by reason of any proceeding at law or in equity, the debts due from the deceased shall not have been ascertained and paid, or the effects of the deceased shall not have been recovered and made available, and in consequence thereof the executor or administrator shall be prevented from claiming such return of duty as aforesaid, within the said term of three years, it shall be lawful for the commissioners of the treasury to allow such further time for making the claim, as may appear to them to be reasonable under the circumstances of the case.

By sect. 8. of the statute 55 Geo. 3. c. 184., it is enacted, That the powers and provisions of former acts shall be put in execution, with regard to the duties under this act: we must go, therefore, to the statutes 36 Geo. 3., 45 Geo. 3., and 48 Geo. 3., for the law in these respects.

By the stat. 36 Geo. 3. c. 52. sect. 3., it is enacted, That the duties thereby imposed shall be under the management of the commissioners of stamps, who are to prepare proper stamps, denoting each rate, and to do all acts for carrying that act into execution.

Sect. 5. And that all persons may be able to take receipts for legacies and residue, or shares of residue, according to that act, the commissioners are to provide paper adapted for such receipts, and to print thereon the form of words in the schedule annexed to that act; and any person requiring them may fill them up with sums, names, and dates, according to the aforesaid

provisions, or use the like form on any other paper, vellum, or parchment.

Sect. 6. That in all cases wherein it is not thereby otherwise provided, the duties shall be paid by an executor or administrator, on retaining for himself or for any other person, or on delivering or satisfying to any other person, any legacy or residue, or share of residue ; and where any executor or administrator shall retain, but not have paid the duty, the duty shall be a debt to his Majesty from the executor or administrator ; and where the legacy is paid, without paying or retaining the duty, the duty shall be a debt from the executor or administrator and the legatee or party in distribution.

Sect. 7. That any gift by will to be satisfied out of the personal estate of any person dying after that act, or out of the personal estate which such person shall have power to dispose of, shall be deemed a legacy within that act, whether given by way of annuity, or in any other form, and whether charged only on personal estate or charged also on real estate, *except so far as it shall be paid out of real estate,\** in a due execution of the will ; and every *donatio mortis causa* shall be deemed a legacy under that act.

Sect. 8. That the value of annuities for lives, or years, or other times to be calculated, and the duties thereon, shall be charged according to the table in the schedule annexed to that act ; and the duty to be paid by four equal payments, *viz.* on completing the payment of the respective four first years ; and the value of such annuity, if determinable on any contingency besides the death of any person, to be calculated without regard to such contingency. But if such annuity determine by death before the four year's payment be due, then the duty shall be payable only in proportion to so many of the payments as became due ; and where the annuity shall determine on any other contingency, not only all future payments of the duty shall cease, but the person who shall have previously paid any such duty may obtain a return of so much as to reduce it to so much as would be payable for the annuity calculated according to the term for which it should have endured, and that such abatement shall be settled by the commissioners according to the tables in the schedule.

Sect. 9. That the value of annuities payable out of a legacy shall be calculated, and the duty charged thereon in the same manner as directed with regard to general annuities ; and the

\* This exception is covered by the stat. 45 Geo. 3. c. 28., see *ante* 306.

duty on such legacy (if any duty shall be payable thereon) shall be calculated on the value of the legacy, after deducting the value of the annuity; and the duty for the annuity shall be paid by the person entitled to the legacy, subject to the like proviso as the duty on general annuities, and shall be deducted out of the annuities for the first four years, or so long as the said annuities shall be paid.

Sect. 10. That the duty on a legacy given for purchasing an annuity of a certain amount shall be calculated on the sum necessary to purchase such annuity according to the aforesaid tables, and shall be deducted from such sum, and paid as on pecuniary legacies, and the annuity to be purchased shall be reduced in proportion to the duty payable thereon.

Sect. 11. That if any benefit shall be given in such terms that the amount or value can only be ascertained from time to time by the actual application of the fund; or if the amount or value of such benefit cannot, by reason of the form or manner of the gift, be so ascertained that the duty can be charged thereon under any of the aforesaid directions; then such duty shall be charged on the sums or effects which shall be applied from time to time for such respective purposes, as separate and distinct legacies or bequests, and shall be paid out of the fund applicable for such purposes, or charged with answering the same.

Sect. 12. That the duty on a legacy or residue to be enjoyed by different persons in succession, who shall be chargeable with the duties at the same rate, shall be paid as in the case of a legacy to one person; and where a legacy is given so as to be enjoyed in succession by different persons, some or one of whom shall not be liable to any duty, and others liable to different duties, so that one rate of duty cannot be immediately charged, all persons who shall be entitled for life, or for any temporary interest, shall be charged with the duty in respect of such bequest in the same manner as if the annual produce thereof had been given by way of annuity. Such charges shall begin when the parties begin to receive the produce, and shall be paid by equal yearly payments for four years, if they so long receive such produce; and all persons who shall become absolutely entitled to such legacy so to be enjoyed in succession shall, when they shall begin to receive the profit thereof, pay the duty for the same, or for such part as shall be so received, in the same manner, as if it had been given immediately.

Sect. 13. That the duty on a legacy or residue to be enjoyed by different persons in succession, on whom the duty is charge-

able at the same rate, shall be deducted and paid by the executor or administrator, on payment of the legacy or residue to any trustee ; and where the legacy or residue shall not be paid to a trustee, the duty shall be paid out of the capital of the property so given, on receipt of any part of the produce by any of the persons so entitled in succession, according to the amount of the capital of which such produce shall be so received ; and where the duty shall be chargeable at different rates, the executor or administrator shall be chargeable with such duties in succession in like manner as if on an immediate bequest, unless where the property shall have been vested in trustees, in which case the trustees shall be chargeable with the duties as if they were executors or administrators ; and where any partial interest shall be given, or shall arise out of any such property, so to be enjoyed in succession, and such partial interest shall be satisfied by any person enjoying the property, such persons shall be charged with the duties payable for such partial interest ; and shall pay and retain the same as if he were executor, and shall be debtor to the king for it as if executor.

Sect. 14. That no duty shall be paid on plate, furniture, or other things not yielding any income, and given to persons in succession, till the same shall be actually sold, or shall come to some person having power to sell the same, or having an absolute interest therein, and shall be then charged on that person only, and not on the executor by reason of his having assented to such bequest.

Sect. 15. That where different persons shall be entitled in succession to a legacy, the duty shall be charged thereon as given to be enjoyed in succession, whether the parties entitled thereto shall take the same under a will or under an intestacy.

Sect. 16. That where a legacy or residue or part of residue, shall be given in joint-tenancy to persons, some or one of whom shall be chargeable with the duty, and any others not chargeable, the persons chargeable shall pay such duty in proportion to their interests, and if any person or persons chargeable shall afterwards, by survivorship or severance, become entitled to a larger interest, he shall pay the duty on such interest accruing, as if the same had been originally given to him.

Sect. 17. That where a legacy shall be given subject to a contingency on which the same may go over to another person, such bequest, unless chargeable as an annuity, shall be charged with duty as an absolute bequest ; and such duty shall be paid out of

the capital of such legacy, notwithstanding the same may, on such contingency, go to a person not chargeable with the same duty, or with any duty. And if the legacy on such contingency go to a person chargeable with a higher rate of duty than the duty so paid, the person becoming entitled shall pay the difference.

Sect. 18. That where a legacy shall be subjected to a power of appointment in favour of particular persons, such property shall be charged with duty as property given in succession; and all parties shall be charged in respect of their several interests, whether previous, or subject to, or under, or in default of such appointment. And where any property shall be given for a limited interest, and an absolute power of appointment shall also be given to any person, who would not be entitled in default of appointment, such property, on the execution of such power, shall be charged with the same duty as if the same property had been immediately given to the person executing the power, after allowing any duty before paid in respect thereof. And where property shall be given with a general power of appointment, which property, in default of appointment, would belong to the party having the power, the duty shall be paid by that person as if it had been an absolute legacy.

Sect. 19. That money, or personal estate directed to be laid out in the purchase of real estate, shall be charged with duty as personal estate, unless the same shall be given to be enjoyed in succession; and then each person entitled thereto in succession shall pay duty for the same, as if there had been no such direction for the purchase of real estate, unless the same shall have been applied in such purchase before such duty accrued; but if before the same shall have been so applied in the purchase of real estate, any person shall become absolutely entitled to the inheritance thereof in possession, the same duty shall be paid thereon as would have been payable on general personal estate.

Sect. 20. That estates *pur auter vie* applicable by law as personal estate shall be charged with the duties as personal estate.

Sect. 21. That money given by will to pay the legacy duty shall not be charged with the duty.

Sect. 22. That where specific legacies and the residue of personal estate consist of property not reduced into money, the executor or administrator may set a value thereon, and



offer the duty thereon at the stamp office, or may require the commissioners to appoint an appraiser at the expense of the executor or administrator, and the commissioners may accept the duty so offered. But if the commissioners shall not be satisfied with such offer, they may appoint a person to appraise, and may assess the duty on such appraisement, and demand such duty. But the parties may cause that appraisement to be reviewed by the commissioners of the land tax for the district where the effects shall be, at their next meeting, if fourteen days shall have intervened; and if not, then at their then next meeting, giving six days' notice to the commissioners of stamps; and the commissioners of the land tax may appoint an appraiser and hear such appeal, and their determination shall be final; and if the valuation of the commissioners of stamps shall not be appealed from within the time aforesaid, or shall be affirmed, the duty shall be paid accordingly; and if it shall be varied on the appeal, the duty shall be paid according to the variation; and if the duty assessed as aforesaid shall exceed the duty first offered, the expense of the appraisement, and other proceedings in assessing such duty, shall be paid by the executor or administrator; and if any dispute arise between any person entitled to any such legacy or residue, and the executor or administrator with respect to the value thereof, or the amount of the duty payable thereon, the duty shall be assessed by the commissioners of the stamps, or the commissioners of land tax on appeal as before.

Sect. 23. That where any legacy shall be satisfied otherwise than by payment of money, or application of specific effects for that purpose, or shall be compounded for less than the amount, the duty shall be paid only on such amount, provided that if any bequest be made in satisfaction of any other legacy or bequest unpaid, the duty shall be paid only on the subject yielding the largest duty.

Sect. 24. That where an executor or administrator shall offer to pay or deliver a legacy or residue on payment of the duty, and the legatee shall refuse to accept the same, and to give a release or discharge, then, although no actual tender be made, if a suit shall be afterwards instituted, the Court may order all costs to be paid by the person who so refused, and also order such person to give a discharge, and may deduct such costs with the duty out of the legacy or effects.

Sect. 25. That if any suit shall be instituted concerning the



administration of the personal estate of any testator or intestate, in which any direction shall be given for payment of any legacies or residue, the Court shall in such direction provide for the payment of the aforesaid duties; and, in all accounts of personal estate, the Court shall take care that no allowance be made for any legacy or residue, without proof of payment of the duties payable thereon.

**Sect. 26.** That any executor or administrator may pay or deliver a legacy, or any part of a legacy, or make distribution of any part of the residue of any personal estate, on payment of the proportion of the duties in respect of such parts of the personal estate as shall be so administered.

**Sect. 27.** That no executor or administrator, or trustee, shall pay, deliver, or satisfy, or compound for any legacy or residue of personal estate, or any part thereof in respect whereof any duty is thereby imposed, without taking a receipt or discharge in writing, expressing the date of such receipt and name of the testator or intestate, and the name of the legatee or party in distribution, and of the person to whom the receipt is given, and the amount of the legacy or residue, or part thereof, and of the duty payable thereon; and no written receipt shall be received in evidence, or be in any manner available, unless stamped as required by that act; and no evidence shall be given of payment of any such legacy or residue, or part of residue, without producing such receipt stamped, unless payment of the duty shall be first proved; provided that a copy of the entry in the books of the commissioners of stamps shall be evidence of such payment: provided also, that payment of any annuity, or legacy charged as an annuity, shall not be deemed a payment for which such stamped receipt shall be required, except that which shall complete the payments for each of the first four years.

**Sect. 28.** That any executor, or administrator, or trustee, or other person liable to pay the aforesaid duty, who shall pay, or satisfy, or compound for any legacy or residue, without taking such receipt as aforesaid, and causing the same to be stamped within the time thereby allowed for that purpose, shall forfeit ten per cent. on the money or value for which such receipt ought to have been given; and every person receiving such legacy or residue, without signing such receipt, expressing the duty to have been allowed or paid, and dated on the day of signing, shall forfeit ten per cent. on the money or value of the property so received or taken.

Sect. 29. That every such receipt shall be brought within twenty-one days after the date thereof to the head office or other office appointed by the said commissioners, to be stamped, paying the duty for the same, and on such payment the proper officer shall write thereon an acknowledgment of the duty paid in words in length, and bearing date on the day of payment, and sign it, and enter an account in a proper book, and then the receipt shall be stamped with the proper one of the four stamps; and if the duty shall be paid at any inferior office, the receipt, with the acknowledgment of the duty paid, shall within twenty-one days be sent to the head office, and be there stamped; and the inferior officer shall sign an acknowledgment that such receipt was left with him for such purpose, and such acknowledgment shall be returned to him on his re-delivering the legacy receipt stamped: but if any such legacy receipt shall not be brought to any such office within twenty-one days, it may be brought in like manner within three calendar months after the date thereof, paying the duty, and ten per cent. on that duty, as a penalty; and the receipt may be then stamped. But the commissioners shall not, on any pretence, except as after mentioned, stamp any receipt unless the duty shall be paid, and the receipt produced to be stamped in manner and within the times respectively limited as aforesaid.

Sect. 30. That if it shall appear to the satisfaction of the commissioners, on oath or affirmation, before a justice of peace, or master or masters extraordinary in Chancery, that less duty has been paid for any legacy or residue than ought to have been paid by mistake, without intent to defraud, and if application be made to the commissioners to rectify such mistake before any suit, and within three calendar months after payment of what was really paid, the commissioners may accept the difference with ten per cent. thereon, as a penalty in full of the duty and all penalties, and may cause an acknowledgment to be written after the payment of the just duty on the receipt, and cause the receipt to be properly stamped.

Sect. 31. That the party paying or receiving any legacy or residue contrary to the provisions of that act, who shall, within twelve calendar months after the offence committed, discover the other party or parties offending, so that he or they may be thereof convicted, shall be discharged from all penalties incurred under that act.

Sect. 32. That where by reason of the infancy, or absence beyond sea, of a legatee, or party in distribution, the executor

or administrator cannot pay any legacy or residue, though he may have assets, he may pay such legacy or residue, or any part thereof, deducting the duty, into the bank, with the priority of the accountant-general of the Court of Chancery, to the account of the person entitled; and such payment shall be a sufficient discharge provided the duty be paid, and the accountant-general shall lay it out, without any formal request, in the purchase of three per cent. consolidated annuities, which, with the dividends thereon, shall be transferred to the party entitled, by application to the Court of Chancery on motion or by petition in a summary way, provided that if the money afterwards appear to have been improperly paid in, the court may on petition in a summary way dispose of it as justice shall require; and if it shall appear that too much duty has been paid, the excess shall be returned by the commissioners of stamps; and if it appear that the duty paid was too little, the party who paid the money into the bank may pay the deficiency, with the penalties, if any, and may apply to the Court of Chancery in a summary way for repayment of the further money so paid to the commissioners for duty out of the money in the bank.

**Sect. 33.** That if at the end of two years after the death of the testator or intestate, it shall appear to the commissioners, that it will require time to collect the debts or effects, or that from circumstances it will be difficult to ascertain and adjust the amount of the residue, and the parties interested shall desire to compound the duty, the parties, with consent of the commissioners, may apply to the court of Exchequer in England or in Scotland, if the deceased resided there, and in manner prescribed in the clause, obtain leave for such purpose.

**Sect. 34.** That if at any time after paying the duty on a legacy, or a residue, it shall be necessary for any legatee or party entitled to refund all or any part of what he received, the commissioners may, on due proof made on oath of the amount of such sum refunded, repay the money over-received for the duty.

**Sect. 35.** That where an executor or administrator shall be entitled to any legacy or residue, he shall be chargeable with the duty when he shall be entitled in a course of administration to retain it; and he shall, before retaining, transmit to the commissioners of stamps a note of the particulars intended to be retained, and the amount and value thereof, and the duty he offers thereon, and the commissioners shall charge the proper

duty thereon, and it shall be paid ; and on such payment the proper officer shall, at the foot of a duplicate of the assessment duly stamped, give a receipt for the said duty, which receipt shall be a discharge for the duty ; and if such executor or administrator shall neglect to pay such duty within fourteen days after it ought to have been paid, he shall forfeit and pay treble the value of the duty.

Sect. 37. That if probate or grant of administration shall be repealed after the executor or administrator shall have paid any of the said duties out of the effects of the deceased which shall not be allowed to him because improperly paid, the commissioners shall repay the duties so paid. But if the duty ought to have been paid by the rightful executor or administrator, then the payment shall be valid, and allowed by him in account, and shall be deemed made as in a due course of administration.

Sect. 38. That persons swearing or affirming falsely touching the said duties, shall be subject to the penalties of perjury.

Sect. 39. That persons altering any assessment or receipt after the same shall have been signed by the proper officer ; or when altered, utter or publish the same as true, with intent to defraud his Majesty, shall forfeit five hundred pounds.

Sect. 40. That persons counterfeiting the said stamps shall suffer death as in case of felony without benefit of clergy.

Sect. 43. That one moiety of all penalties and forfeitures thereby imposed, where no other mode of prosecution is thereby prescribed, shall, if sued for within three calendar months next after they were incurred, be to the king, and the other moiety, with the full costs of suit, to the informer or person suing for them within the time aforesaid ; and they may be sued for in the court of Exchequer in England for offences in England, and in Scotland for offences there. But proceedings may be stopped, if it appear that the penalties were incurred without intention of fraud.

Sect. 44. That, in default of prosecution for such penalties within the time aforesaid, they shall be recoverable only for the crown, by information in the Court of Exchequer in England and Scotland respectively.

Sect. 47. That all actions or suits, which shall be commenced against any person for any thing done in pursuance of that act, shall be commenced within six calendar months after the fact committed, and not afterwards.

By the stat 45 Geo. 3. c. 28. sect. 2. it is enacted, That the

duties granted by that act shall not extend to, or be charged or payable in respect of any legacies satisfied out of any real or personal estate, or in respect of any residue or share of any personal estate, or of any monies or residues, or parts or shares of monies arising from the sale of any real estate of any person dying before the passing of this act.

Sect. 3. That nothing therein contained shall extend to charge with any of the duties thereby granted any legacy or residue, or part or share of residue, which shall be given or pass to or for the benefit of the husband or wife of the deceased; or to or for the benefit of any of the Royal Family.

Sect. 4. That every gift by any will or testamentary instrument of any person dying after the passing of this act, which by virtue of any such will or testamentary instrument shall have effect, or be satisfied out of the personal estate of such person so dying, or out of any personal estate which such person shall have power to dispose of as he or she shall think fit, or which shall have been charged upon or made payable out of any real estate, or be directed to be satisfied out of any monies to arise by the sale of any real estate of the person so dying, or which such person may have the power to dispose of, whether the same shall be given by way of annuity, or in any other form, shall be deemed and taken to be a legacy within the true intent and meaning of this act: provided always, that nothing herein contained shall be construed to extend to the charging with the duties by this act granted any specific sum of money, or any share or proportion thereof, charged by any marriage settlement or deed upon any real estate, in any case in which any such specific sum, or share or proportion thereof, shall be appointed or apportioned by any will or testamentary instrument under any power given for that purpose by any such marriage settlement or deed.

Sect. 5. That the duties thereby granted upon legacies, charged upon, or made payable out of any real estate, or out of any monies to arise by the sale of any real estate, or upon residues or parts or shares of residues of any such monies, shall be accounted for, answered, and paid by the trustees, to whom the real estate shall be devised, out of which the legacy, or any money arising out of the sale or mortgage or other disposition of such real estate, shall be to be paid or satisfied; or if there shall be no trustees, then by the person entitled to such real estate, subject to any such legacy, or by the person empowered or required to pay or satisfy any such legacy; and

the said duties shall be retained by the person paying or satisfying any such legacy, or share of money, in like manner, and according to such rules and regulations, and under and subject to such penalties, as far as the same can be made applicable, as are contained in stat. 36 Geo. 3. c. 52.

By stat. 42 Geo. 3. c. 99. sect. 2. it is enacted, That in every case in which an executor or executors, or administrator or administrators, shall not have paid the duties granted and payable upon or in respect of any legacies or any personal estate, or any share or shares of any personal estate, of any persons dying intestate, by and in pursuance of an act passed in the thirty-sixth year of the reign of his present Majesty, or any other act or acts of Parliament relating to duties on legacies or shares of personal estates within proper and reasonable time, it shall be lawful for his Majesty's Court of Exchequer, upon application to be made for that purpose on behalf of the commissioners appointed for managing the duties on stamped vellum, parchment, or paper, on such affidavit or affidavits as to the said court may appear to be sufficient, to grant a rule, requiring such executor or executors, administrator or administrators, to shew cause why he, she, or they should not deliver to the said commissioners an account, upon oath, of all the legacies, or of the personal property, respectively paid, or to be paid, or administered by him, her or them, as the case may be, and why the duties on any such legacies, or any shares or residue of any such personal estate, have not been paid, or should not be forthwith paid according to law, and to make any such rule of court absolute in every case in which the same may appear to the said court to be proper and necessary for the better enforcing the payment of any of the said duties.

By the Statute 48 Geo. 3. c. 149. sect. 36. That where the executors or administrators of any person deceased shall be desirous of transferring or of receiving the dividends of any share, standing in the name of the deceased, of and in any of the government or parliamentary stocks or funds transferable at the Bank of England, or of and in the stock and funds of the governor and company of the Bank of England, or of and in the stock and funds of any other company, corporation, or society whatsoever, passing by transfer in the books of such company, corporation, or society, under and by virtue of any such probate or letters of administration as aforesaid, and shall allege that the deceased was possessed



thereof or entitled thereto, either wholly or partially, as a trustee, it shall be lawful for the said governor and company of the Bank of England, and for any such other company, corporation or society as aforesaid, or their respective officers, for their indemnity and protection, to require such affidavit or affirmation of the fact, as hereinafter is mentioned, if the fact shall not otherwise satisfactorily appear; and thereupon to permit such executors or administrators to transfer the stock or fund in question, or receive the dividends thereof, without regard to the amount of the stamp duty on the probate of the will of the deceased, or the letters of administration of his or her effects; and where the executors or administrators of any person deceased shall have occasion to recover any debt or debts, or other personal effects, due or apparently belonging to the deceased, and shall allege that the deceased was possessed thereof, or entitled thereto, either wholly or partially, as a trustee, it shall be lawful for the person or persons liable to pay or deliver such debt or debts or other effects, to require such affidavit or affirmation of the fact as hereinafter is mentioned, if the fact shall not otherwise satisfactorily appear; and thereupon to pay, deliver, or make over the debt or debts, or other effects in question, to such executors or administrators, or as they shall direct, without regard to the amount of the stamp duty on the probate of the will of the deceased, or the letters of administration of his or her effects; and where the executors or administrators of any person deceased shall have occasion to assign or transfer any debt or debts due to the deceased, or any chattels real, or other personal effects, whereof or whereto the deceased was possessed or entitled, and shall allege that the same respectively was or were due to or vested in the deceased, either wholly or partially, as a trustee, it shall be lawful for the person or persons, to whom or for whose use such debt or debts, chattels real, or other personal effects, shall be proposed to be assigned or transferred, to require such affidavit or affirmation of the fact as hereinafter is mentioned, if the fact shall not otherwise satisfactorily appear; and thereupon to accept the proposed assignment or transfer, without regard to the amount of the stamp duty on the probate of the will of the deceased or the letters of administration of his or her effects.

Sect. 37. That upon any such requisition as aforesaid the executor or executors, administrator or administrators of the deceased, or some other person or persons, to whom the facts shall be known, shall make a special affidavit or affirmation of



the facts and circumstances of the case, stating the property in question, and that the deceased had not any beneficial interest whatever in the same, or no other beneficial interest therein than shall be particularly mentioned and set forth (as the case may be) in trust for some other person or persons, whose name or names, or other sufficient description, shall be specified in such affidavit or affirmation, or for such purposes as shall be specified therein; and that the beneficial interest of the deceased, if any, in the property in question, doth not exceed a certain value to be therein also specified, according to the best estimate that can be made thereof, if reversionary or contingent, and that the amount or value of the estate, for which the stamp duty was paid on the probate of the will of the deceased, or on the letters of administration of his or her effects, is sufficient to include and cover such beneficial interest of the deceased, as well as the rest of the personal estate, whereof or whereto the deceased was beneficially possessed or entitled, and for which such probate or letters of administration shall have been granted, as far as the same have come to the knowledge of such executor or executors, administrator or administrators; and where the affidavit or affirmation of the facts and circumstances of the trusts shall be made by any other person than the executor or executors, administrator or administrators of the deceased, such executor or executors, administrator or administrators, shall make affidavit or affirmation, that the same are true to the best of his, her, or their knowledge, and that the property in question is intended to be applied and disposed of accordingly; which affidavits or affirmations shall be sworn or made before a Master in Chancery, ordinary or extraordinary, (who is hereby authorized to take the same, and administer the proper oath or affirmation for that purpose,) and shall be delivered to the party or parties requiring the same, and shall be sufficient to indemnify and protect the party or parties acting upon the faith thereof; and if any person or persons making any such affidavit or affirmation as aforesaid shall knowingly and wilfully make false oath or affirmation of or concerning any of the matters to be therein specified and set forth, every person so offending, and being thereof lawfully convicted, shall be subject and liable to such pains and penalties as by any law now in force persons convicted of wilful and corrupt perjury are subject and liable to.

Sect. 44. That in all cases where any receipt or discharge given for any legacy, or for the residue or any share of the re-

sidue of any personal estate, which shall have been given by will or other testamentary instrument, or have devolved to any person or persons upon intestacy, shall be brought to the head office, to be stamped after the expiration of three calendar months from the date thereof, it shall be lawful for the said commissioners to cause the same to be duly stamped, for making the same available, on payment of the duty which shall be payable in respect thereof, together with the penalty incurred in consequence of the same not having been brought to be stamped before the expiration of such three calendar months: and where any such receipt or discharge shall have been signed out of Great Britain, if the same shall be brought to be stamped within twenty-one days after its being received in Great Britain, it shall be lawful for the said commissioners to remit any penalty that may have been incurred thereon, and to cause the same to be duly stamped, on payment of the duty payable in respect thereof; any thing contained in any former act or acts to the contrary notwithstanding.

### III. PRECEDENTS OF WILLS

AND

### TESTAMENTARY DISPOSITIONS.

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No. I.

*A convenient form of a Will, containing dispositions of real and personal Property, the whole to form one Fund, and go as personal Estate (1).*

Devise of  
real estate to  
trustees and  
their heirs, to  
sell and con-  
vert into  
money.

**THIS** is the last will and testament of me, Samuel H. of &c. I give and devise unto A. B., C. D., and E. F., their heirs and assigns, all my freehold and copyhold messuages, lands, tenements, and hereditaments, whereof I have power to dispose, with their and every of their rights, members, and appurtenances, in possession, reversion, remainder or expectancy, to hold the same unto and to the use of them the said, &c. their heirs and assigns for ever, upon trust, that they, the said

Of the advan-  
tage of treating  
all the proper-  
ty as personal.

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(1) Where the testator's property is freehold, and there are several persons and their families to be provided for, who are equally the objects of the testator's care, it is often inconvenient to settle the estate as land, as well from the difficulty in the way of a specific division by metes and bounds, as from the embarrassment and expense which often arise from creating numerous undivided shares in tail. It is advisable in such a case to vest the lands in trustees, to be sold with the consent of those beneficially interested, with directions to place out the produce of such sale, after discharging debts and legacies, in the funds or on real securities, to pay the interest in certain proportions to the persons who are to have life interests, and after their deaths to pay over the principal in equal shares among the children, with such other provisions as are exemplified in this will; and no sale need be made till the convenience of the parties calls for it, or a proper occasion offers itself.

(trustees), or the survivors or survivor of them, or the heirs or assigns of such survivor (2), do and shall, as soon as conveniently may be after my death, sell and absolutely dispose of the same, together or in parcels, by public auction or private contract, as to them or him shall seem expedient, for the best price or prices, in money, that can be reasonably had or obtained for the same respectively, and to convey and surrender the same accordingly. And I will and declare, that the receipt or receipts of the said (trustees), or the survivors or survivor of them, or the heirs or assigns of such survivor, for the money for which the same shall be so respectively sold, shall from time to time be a sufficient discharge (3), or sufficient

(2) If lands are devised to be sold, and nobody appointed to sell, it is the province of the executors, and a court of equity will compel all proper parties to join in the sale, 1 Atk. 490. The word 'dispose' does not of itself import a direction to sell, but to manage the estate, 3 Atk. 287.

(3) This clause ought never to be omitted; for though, where it is not inserted, the purchasers from the trustees are justified at law in paying their money to the trustees; yet, in equity, they are, in certain cases, considered as responsible for the application of the money according to the trusts. They have been held liable in most cases, where there is a specification of the debts to be paid with the produce of the sale, but not where the trust is to pay debts generally, even though they have notice of the debts; nor are the purchasers bound where the trust is to pay debts generally, *and also legacies*; for though these last are specified objects, yet they are coupled with others which are unascertained, and they shall not involve the purchaser in the account of the debts: neither is the purchaser bound to see to the application of the purchase-money, where the debts are *charged* generally upon the estate, though the contrary seems formerly to have been held; 6 Ves. Jun. 654, n. But where lands are charged with the payment of *annuities*, they are liable in the hands of purchasers; for the object of making the lands a fund for the payment in this case was that there should be a constant and subsisting fund, Barnard, 82. 5 Ves. Jun. 130. *Wynn v. Williams*. These appear to be the most important distinctions.

Of the clause for discharging purchasers, and their liability, in the absence of such clause, to look to the application of the purchase money.

It is a general rule, that where property is devised to be sold by the trustees for particular purposes, as for payment of debts and legacies, nothing more is subjected than those purposes require, and the personal estate must first be applied. There is, in these cases, therefore, always a resulting trust of the residues after the purposes are answered: the real results to the real, and the personal to the personal representative; and if the personal is sufficient to answer all the purposes, the whole real estate results and descends to the heir, or goes to the residuary devisee. And by the way it may be here noticed, that this residue is not like the residue that arises by lapse, in respect to which there is a difference between real and personal estate, as has before been observed.

Of the conversion of real into personal estate, in equity, when partial, and when total.

But sometimes by the effect of the dispositions of the will, as where there are ulterior general purposes to be answered by the sale, which require the

That the monies arising by the sale shall be personal estate; and, until sold, the rent shall be considered as the income of the personal estate; and that the said

discharges, to the purchaser or purchasers of the said several premises hereinbefore made saleable by this my will, or any part or parts thereof, for his, her, or their purchase-money, or so much thereof as shall be therein acknowledged or expressed to have been received; and that such purchaser or purchasers, his or their heirs, executors, administrators or assigns, or any of them, shall not afterwards be answerable or accountable for any loss, misapplication or misapplications of such purchase money so received, or any part or parts thereof. And my will further is, that the monies which shall arise by or from such sale or sales, as aforesaid, shall be deemed to be part of my personal estate; and that the clear yearly rents and profits of the said hereditaments and premises, in the mean time, until the same shall be sold, or of so much thereof as shall be remaining unsold, shall be deemed to be part of the annual income

estate to be converted, as is the case in the will to which this note is attached, the real estate by the direction to sell is made personal estate *out and out*, as it is usually expressed. And then there is no resultancy for the heir at law, but the character of personalty is impressed upon it to all intents and purposes; and if there is a residue, it goes with the residuary bequest; or if there is no disposition of the residue, the mere appointment of an executor is sufficient to carry it to him, either for his own benefit, or as trustee for the next of kin; which question, between the executor and next of kin, has been discussed in a preceding part of this Work under its proper title; see *Robinson v. Taylor*, 2 Bro. C.C. 589. and 1 Ves. J. 44. and see *Berry v. Usher*, 11 Ves. J. 87. When the estate is only devised to be sold to pay debts and legacies, it is considered as in the nature of a charge only, *Haldemand v. Hudson*, 3 Ves. J. 210.

Of the rule in respect to trustees becoming purchasers.

A trustee for sale, as long as he retains that character, is never permitted to purchase for his own benefit. And though in a particular case there may be the most satisfactory evidence that the transaction amounts to no more than what the general interests of justice and of the parties would warrant; yet, as the powers of the court would not be equal to protect against deception, from the impossibility of knowing the truth in every case, the rule of exclusion must of necessity be universal. The ground of the rule is, that the situation of the trustee gives him the opportunity of knowing the value of the estate he is to buy, better than the cestui que trust; and therefore they do not deal on equal terms: besides which, he is by his trust bound to apply his knowledge for the benefit of his cestui que trust; and therefore he cannot be permitted to make a bargain adversely with the party whose interest he is in conscience obliged to promote. But the trustee may shake off the character of a trustee by a previous agreement with his cestui que trust, if of age and capable of discharging him, (though it may be difficult to determine when that has been done effectually) and put himself in circumstances in which he will no longer be the person intrusted to sell; and then, it seems, he will be permitted to purchase; see the cases *ex parte Bennett*, 10 Ves. J. 381. and *Sanderson v. Walker*, 13 Ves. J. 601.

of my personal estate; and that the same monies, and rents and profits, shall be subject to the dispositions hereinafter made concerning my personal estate, and the annual income thereof, respectively. And as touching my personal estate remaining after payment of my debts, funeral and testamentary charges, and the legacies hereinafter bequeathed, I give the same to the said trustees, their executors, administrators, and assigns, upon the trusts, and for the intents and purposes, and under and subject to the powers, provisoes, declarations and agreements hereinafter expressed and declared, of and concerning the same, that is to say, upon trust that they, the said (trustees) or the survivors or survivor of them, or the executors or administrators of such survivor, do and shall place out and invest the same in or upon any of the parliamentary stocks or funds of Great Britain, or on real securities in England, at interest, and do and shall vary, alter or transpose (4) such stocks, funds or securities for others of the like nature, when and so often as it shall seem expedient; and do and shall pay the interest and dividends of the said stocks, funds, and securities, unto such person or persons only, and for such intents and purposes only, as my daughter, E. H. by any writing or writings under her hand, from time to time, shall direct or appoint, notwithstanding any coverture she may be under; and in default of such direction or appointment, and in the mean time until she shall make any such direction or appointment, do and shall pay the same, or so much whereof she shall or may from time to time happen to make no such appointment, into the proper hands of my said daughter, exclusively (5) of any husband she may happen to marry, who is not to intermeddle therewith, nor is the same or any part thereof to be subject or liable to such husband's controul, debts, or engagements. And I will and declare, that the receipts of my said daughter, or of such person or persons as she shall or may, from time to time, direct or appoint to receive such dividends or interest, shall, notwithstanding any such coverture, be good and effectual releases and discharges for the same, or so much thereof, as in such receipts

monies, rents, &c. shall be subject to the dispositions after mentioned, as to the personal property. And as to his personal estate remaining after payment of debts and legacies, and funeral and testamentary charges.

To the trustees upon trust to invest the same in the public funds.

With power to vary the securities.

To pay the dividends to the testator's daughter for life, for her separate use.

(4) If a trustee of stock take upon him to transfer at all without such a power, he is guilty of a breach of trust, and the cestui que trust is entitled in equity to his election, either to have the individual stock restored to him, or to have the money it produced; 2 Atk. 121; *Harrison v. Harrison*, 2 Bro. C. C. 653. *Bostock v. Blakeney*, 1 Ves. J. 297. *Powlet v. Herbert*, 4 Ves. J. 497. *Long v. Stewart*, 5 Ves. J. 800, (n).

Of the propriety of giving the power of varying the securities.

(5) Where no trustee happens to be appointed for the wife to whose separate use property is devised, the husband becomes a trustee for the wife, 2 P. Wms. 316.

Where no trustee appointed.

And after the daughter's decease to transfer the principal to and among her children in equal shares.

The respective shares to become vested at 21, or marriage.

With accruer by survivorship.

shall be expressed to be received ; and from, and immediately after the decease of my said daughter, upon trust, that they, the said trustees or trustee, for the time being, do and shall pay, or transfer, all such principal monies, stocks, funds, and securities, unto all and every the child, or children, of the body of my said daughter, lawfully to be begotten, equally to be divided between or among them, share and share alike, if there shall be more than one ; and if there shall be but one such child, the whole to be paid or transferred to such one child ; the share or shares of such of them, as shall be a daughter or daughters, to become vested in her or them respectively, on her or their attaining her or their respective ages of 21 years, or on the day, or respective days, of her or their marriage, which shall first happen ; and the share or shares of such of them as shall be a son or sons to become vested in him or them respectively, on his or their attaining his or their age, or respective ages, of 21 years, and to be paid or transferred at such age or ages, time or times, as aforesaid, to such of the said daughters or sons, as shall arrive at, or attain the same, after the decease of my said daughter ; but as to such of them as shall arrive at or attain such age or ages, time or times, as aforesaid, in the life-time of my said daughter, the payment or transfer of his, her, or their share or shares, to be postponed till after her decease : provided, and I do hereby declare my will to be, that if any such child or children, being a son or sons, shall depart this life before he or they shall attain his or their respective ages of 21 years, or being a daughter or daughters, shall happen to die before she or they shall attain her or their age or respective ages of 21 years, or be married, then the share or shares of him, her, or them so dying, shall go and accrue to the survivors or survivor, or others or other, of such children, and be equally divided amongst them, if more than one, share and share alike ; and the same shall become vested and payable, or transferable, at such ages, days, and times, as his, her, and their original portion and portions are hereby directed to become vested and payable, or transferable, as aforesaid ; and in case of the death of any other of the said children of my said daughter, before such accruing or surviving share or shares, shall become vested as aforesaid, then every such accruing or surviving part, or share, shall again be subject and liable to such right, chance, contingency, or condition, or accruer to, and amongst the survivors or survivor (6), and

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(6) A. gives 1000*l.* among four persons, as tenants in common ; and directs, that if one of them dies before 21, or marriage, it shall survive to the



others or other, of the said children, as hereinbefore is provided, touching the said original portion or portions; and upon further trust, that the said trustees, or trustee, for the time being, do and shall, after the decease of my said daughter, pay and apply the dividends or interest of the share or shares of such of the said children as shall not have acquired a vested interest in the portion, or portions, hereinbefore provided, or intended for him, her, or them, respectively, for, and towards, his, her, or their maintenance and education, respectively, until the same respectively shall become payable. Provided, that if there shall be no child of the body of my said daughter, lawfully begotten, or there being one or more such child or children, and such of them as shall be a son or sons, shall happen to die before he or they shall attain the age of 21 years, and such of them as shall be a daughter or daughters, shall happen to die before she or they shall attain her or their age or respective ages of 21 years, or be married, then, and in such case, it is my will, that they, the said trustees or trustee, for the time being, shall pay or empower ———, to receive the dividends, or interests thereof, during her life; and from and immediately after her decease do and shall raise the sum of ——— $\frac{1}{2}$  of lawful money of Great Britain, and pay the same to my nephew D., his executors or administrators, and do and shall pay, or transfer, one third part of the surplus thereof, to ———, her executors or administrators, one third part to ———, her executors or administrators, and the remaining third part thereof, to ———, her executors or administrators; provided, that in case my said daughter shall be in her minority, and unmarried at the time of my decease, the said trustees or trustee, for the time being, shall apply the dividends, or interest of such principal monies, stocks, funds, or securities, as aforesaid, for or towards her maintenance and education, until she shall attain her age of 21, or shall be married; provided further, that it shall be lawful for my said trustees or trustee, for the time being, in case my said daughter shall marry, (so as such marriage, if she shall be under the age of 21 years, shall be had with the consent (7) of her guar-

Provision for maintenance.

In case of there being no child to take the benefit of the before mentioned trust, then to pay the testator's mother the dividends.

And after her decease to raise the sum of — $\frac{1}{2}$  for — and to divide the surplus among — and — Proviso, in case of the daughter's being a minor at testator's death, for applying the dividends for her maintenance until her coming of age.

other; if one dies, and three are living, the share of that one so dying, will survive to the other three; but if a second dies, nothing will survive but his original share, for the accruing share is a new legacy, 3 Atk. 80. 2 Ch. Rep. 131. 1 P. Wms. 275. Ca. temp. Talb. 124. 1 Bro. C. R. 575. The will, therefore, must especially provide for this:

(7) A point has been made, whether notice to the party was necessary or not; and it has been decided to be not necessary. *Williams v. Fry*, 1 Mod. 86.

Of the clause making the accruing shares subject to survivorship.

dians or guardian,) to raise, by and out of the said principal money, stocks, funds, or securities, the sum of ——.l. of lawful money of Great Britain, and to pay the same upon, or im-

In adverting to Frances's case, 8 Rep. 92. where it was ruled, that the party ought to have notice, the chief justice observed, that in that case the party to be excluded was the heir at law, but not so in the case before him. In the case above-mentioned, evidence was produced to shew, that the trustees gave consent after the marriage: but Lord Vaughan observed, that the post consent was nothing, for consent cannot be had of things which cannot be otherwise; a man cannot be said to consent to his stature, or the colour of his hair. 1 Mod. 312. But as to this point, respecting the operation of post consent, there may, perhaps, be a difference between a restriction upon marriage without consent, and against consent. See *Fleming v. Waldegrave*, 1 Ch. Rep. 58. cited 2 Vern. 573. It is the doctrine of the ecclesiastical courts, and of the civil law, that matrimony should be free; and courts of equity lean towards the same doctrine, making a distinction, however, between conditions absolute, and conditions followed by a devise over, to which Lord Hale gave the appellation of conditional limitations. Thus, where a testator devised 3000*l.* to his daughter, at 21, or marriage, provided she married with the consent of B. and if she married without such consent, then she was to have only 500*l.* and the 3000*l.* legacy was to cease. The daughter married without consent; yet the whole 3000*l.* legacy was adjudged to her, because it was not devised over, but only to fall into the surplus, *Garret et Ux. v. Pritty*, 2 Vern. 293. And this case was cited and confirmed, 1 Atk. 375. But where there was the devise of a legacy to a daughter, but if she married without her mother's consent, then 500*l.* of the daughter's legacy was to go to the son, there, upon the daughter's marrying without the mother's consent, it was decreed that the son should have the 500*l.* for it was said by the court that it was not to be taken as a clause in terrorem only, but that the 500*l.* devised over was well devised over, being an interest vested in the ulterior devise, 2 Vern. 357. *Stratton v. Grymes*, 3 Atk. 367. In a subsequent case, where a portion was given to a daughter, with a likerestriction, if she married without consent, without any limitation as to time, followed by a disposition of the portion to another person, upon breach of the condition, the court held, that the marriage, without consent, was such breach of the condition, and that though a condition subsequent, the court could not relieve against the forfeiture, by reason of the devise over; although it was a hard condition, no time being limited, and extending to a marriage even after the age of 21. *Aston v. Aston*, 3 Vern. 452. It has been held that a devise of the residue is equivalent to a devise over. *Ames and Harmer*, 1 Eq. Abridg. 112. *Wheeler v. Bingham*, 3 Atk. 364. *Scott v. Tyler*, 2 Bro. C. C. 431.

In our own law a distinction has always been taken between the cases, wherein the condition has been precedent, and wherein it has been subsequent. And, generally, this seems also to have been the sense of the civil law. For where a legacy was given upon a precedent fact, which might, or might not happen, or directed to be paid at a certain time, which might or might not come, if the fact required did not happen, or the time required never came, by the civil law the legacy was lost. Dig.

mediately after, such marriage, to such person or persons, and for such purposes, as my said daughter, by any writing, or writings, under her hand, attested by two or more credible

L. xxxvi. Tit. 2. l. 21, 22. L. xxxv. Tit. 1. l. 41. By Ulpian. But in respect to restraints upon matrimony, the civil law made no distinction between conditions precedent, and conditions subsequent, however it might admit such distinction in other cases. While, in the decisions of our own courts, this distinction has been applied to matrimony, as well as to other cases. In the case of *Gillet v. Wray*, 1 P. Wms. 284, one by will left to his grand-daughter an annuity of 10*l.*; and afterwards, by a codicil to his will, declared, "that if his grand-daughter should marry with the good-liking of his trustees, then she should have 150*l.*, and her first annuity should cease." The grand-daughter afterwards married without the consent of the trustees, and Lord Cowper would not relieve against the condition. And it seems, from that case, that where the condition is in the affirmative, and introduced with the conjunction *if*, it is a condition precedent. But it may be seen from the case of *Taylor v. Bury*, 2 P. Wms. 625, that the Courts will gladly lay hold of circumstances, to avoid the construction of a condition precedent, in cases of restriction upon matrimony. In that case, one devised the residue of his personal estate to I. S. provided she married with the consent of his ~~two~~ executors. One of them died, and she married without the consent of the survivor. This was considered as a condition subsequent; and the grounds upon which it was so considered, were two: first, that it was the devise of the residuum, which, if the condition were held to be precedent, might not have vested till 20 or 30 years after the testator's death. 2nd. That the bequest was first to I. S., which, if the will had stopped there, would have been an absolute devise, and the condition annexed followed the devise. And thus considering it, the rule of law applied, *viz.* that if a condition subsequent becomes impossible, by the act of God, the grantee is excused from the condition. In this case it became impossible, inasmuch as the consent of both executors was required, and one was dead. These distinctions between conditions precedent and subsequent were taken in the case of *Long v. Dennis*, 4 Bur. 2052: but all the court in that case agreed, that conditions in restraint of marriage are to find no favour in any court of justice. There the condition was, that "in case I. S. should marry with any woman, not having a competent marriage portion, or without the consent and approbation of the trustees, to be expressed in writing," then the estate was to go over. Lord Mansfield said the construction must be to vest the estate, in case I. S. married a woman of competent fortune, or had the consent and approbation of his trustees to marry a woman without one; and I. S. having married a woman with a competent portion, though without the consent of the trustees, it was adjudged, that a compliance with either part of the alternative was a performance of the condition. It may be worthy of remark, that in this case, it was declared by the testator, that the condition should not be construed in *terrorem*, which express caution, the chief justice said, made it doubly in *terrorem*.

Of conditions  
in restraint of  
matrimony.

Where conditions of this sort respect interests in lands, such conditions shall prevail, and it will make no difference, whether it be precedent or

witnesses, shall direct ; and I give the following legacies, that is to say, I give to my mother 300*l.* ; to my three sisters 100*l.* a-piece ; to my nephew, J. H——, 300*l.* ; to my niece,

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subsequent, or whether there be or be not a devise over : which is a doctrine in conformity with the rule, that portions or legacies charged upon lands do not vest until the time of payment arrives. And with respect to personal legacies, where the condition in restraint of marriage is followed by devise over, the rule is the same ; but where, in the case of personalty, the condition is considered as subsequent, and there is no devise over, the courts will construe such a condition in *terrorem* ; and it is said that the doctrine is grounded upon an inclination in the Court of Chancery to conform to the maxims of the civil law, and ecclesiastical courts, in this respect. It is to be observed, however, that this conformity is not maintained throughout ; since, the circumstance of there being a gift over or not, makes no difference in the decisions of the ecclesiastical courts. But it may be doubted, whether it is quite correct to say, that the ecclesiastical court recognises no distinction between conditions precedent, and conditions subsequent, in respect to this question.

The truth seems to be, that where the title to the legacy is made to depend upon the marriage, with consent, although the ecclesiastical court, notwithstanding its favour towards matrimony, yields to the necessity of considering marriage as a proper condition precedent, so that in such case, until marriage, the legacy shall not vest ; still it regards the matter of consent, which operates as a restraint upon the marriage, as no integral part of the condition, but rather as a circumstance and an appendage. But it does not appear, upon an attentive perusal of the great aggregation of cases, which bear upon this subject, that our law has followed the ecclesiastical court to this extent ; but with more propriety, wherever the condition is clearly, and unavoidably, a condition precedent, though the subject be personal, it regards the necessity for the consent, whether required by settlement, or will, as an integral part of it. This seemed to be the firm opinion of Lord Chief Baron Comyn, in the great case of *Harvey v. Aston*, Com. 726, and also of the chancellor and judges in the case of *Scott v. Tyler*, 2 Brown, 431. in which the reader will find the legal reasons for so considering this point learnedly expounded, in the very elaborate argument of Mr. Hargrave. And see the case of *Creagh et Uxor v. Wilson*, 2 Vern. 572. which was relied upon by Chief Baron Comyn. It is to be lamented, however, that this part of the question has been left in some uncertainty ; an uncertainty not at all removed by the note of Mr. Serjeant Williams, to the case of *Harvey v. Aston*, in Lord Talbot's cases, which seems in some respects to be an incorrect view of the doctrine.

Mr. Sanders's note to *Harvey v. Aston*, 1 Atk. 380, is more intelligent and correct, though we cannot accede to the opinion expressed in that note, that a condition, involving such constraint, and plainly precedent, is only allowed by courts of equity to be effectual where it substitutes a less for a greater legacy. A distinction that supposes a principle of law can never without a great sacrifice of certainty and consistency, be made to vary with the varying circumstances of the cases.

S—— 100l. ; to Mrs. B—— and her daughter, 20l. a-piece for a ring ; to Mr. N—— 50l. ; and to each of my executors, hereinafter appointed, 50l. And I appoint the said —— executors of this my last will and testament. Provided, and my will is that if the said, &c. or any of them, or any of their heirs, executors, administrators, or assigns, or any trustees or trustee, to be appointed in the place of any of them, as hereinafter is mentioned, shall die, or be desirous of being discharged from, or refuse or decline to act, or become incapable of acting in the trusts of this my will, before the same respectively shall have been fully executed, performed, or discharged, then, and in such case, and so often as the same shall happen, it shall and may be lawful to and for the person

Proviso for changing trustees, and for their indemnity.

We would not finish this note without adding, that wherever a trustee, invested with the power of restraint, withholds his consent without just cause, or on improper grounds, a court of equity will supply such consent. See *Peyton v. Bury*, 2 P. Wms. 628. and 1 Atk. 375. 2 Atk. 16. And more particularly where the executor appears to have an interest operating on his behaviour in this respect, *Long v. Dennis*, 4 Burr. 2052. If an absolute consent be given, it is irrevocable. *Dashwood v. Bulkeley*, 10 Ves. 242. And if a conditional consent be given, and the condition be performed, such consent becomes absolute. But where a trustee consents to a marriage, on condition of a settlement being made, and such settlement is refused to be made, and the consent in consequence retracted, if the marriage afterwards takes place without a fresh consent, equity will not relieve against the forfeiture, where the condition is subsequent, and a devise over. If a portion be given in consideration that a daughter should never marry, such general restraint is clearly invalid, being repugnant to the very law of the creation. *Swinb.* 6th Edit. 282. And all conditions in restraint of marriage are considered with some jealousy by the courts. A strict performance has sometimes been dispensed with : as where only the major part of the guardians have consented, 1 Atk. 375. Or, where only a tacit or implied consent has been given, 2 Vern. 580. Where the condition has been general, it has been construed with a limitation to the period of minority, 2 P. Wms. 547. Where the consent has been once given, a second marriage has been held good, without consent, 3 Bro. C. C. 128. And even where the party has married once, between the will and testator's death, the restriction has been adjudged not applicable to a second marriage, 3 Ves. Jun. 227. Where there was a proviso not to marry without the consent of certain persons first had in writing, and consent was given, but not in writing, it was said by Serjeant Ellis, in the case of *Foy et Ux v. Pester*, 1 Mod. 306, in addressing the court, to have been ruled good by them upon another occasion ; and such ruling was recognized by Lord Chief Baron Hale, who observed, that there was great equity in it, because such restraint was only a provident circumstance for obliging the party to obtain consent by a more solemn communication, and, to ascertain the fact of its having been granted ; and therefore it was rather circumstance than substance.

or persons who for the time being, shall be entitled to the dividends, or interest, of the residue of my personal estate, if such person or persons shall be of full age ; and if not, then for the guardians or guardian of such person or persons, by any writing or writings under their, his, or her hands and seals, or hand and seal, to nominate, substitute and appoint, any other person or persons to be a trustee or trustees in the place of him or them so dying, or desiring to be discharged, or refusing or declining to act, or becoming incapable of acting as aforesaid : and that when and so often as any new trustee or trustees shall be nominated, or appointed, as aforesaid, all the trust-estates and premises, which shall then be vested in the trustee or trustees so dying, or desiring to be discharged, or refusing or declining to act, or becoming incapable of acting as aforesaid, either solely, or jointly with the other trustee or trustees, shall be thereupon with all convenient speed conveyed, assigned, and transferred in such manner, and so as that the same shall and may be legally and effectually vested in the surviving or continuing trustee or trustees of the same trust estates and premises respectively, and such new or other trustee or trustees ; or if there shall be no continuing trustee or trustees of the same trust estates and premises, then in such new trustee only, upon the same trusts as are hereinbefore declared or expressed, of or concerning the same trust estates and premises respectively, the trustee or trustees whereof shall so die, or be desirous of being discharged, or refuse or decline to act, or be incapable of acting as aforesaid, or such of them as shall be then subsisting or capable of taking effect. And my further will is, that all and every such new trustee or trustees shall or may in all things act and assist in the management, carrying on, and executing of the trusts to which he or they shall be so appointed, in conjunction with the other then surviving or continuing trustees or trustee of the same trust estates and premises, if there shall be any such continuing trustees or trustee ; and if not, then by himself or themselves respectively, as fully and effectually, and with all the same power and powers, authority and authorities, of consent, approbation, discretion, selling, conveying, calling in, laying out and investing, giving and signing receipts, indemnifications, and discharges, to purchasers and others, and all other powers and authorities whatsoever, as if he or they had been originally in and by this my will nominated a trustee or trustees for the purposes for which



he or they shall be respectively so appointed, or as the trustee or trustees named in this will, or in or to whose place such new trustee or trustee shall respectively come or succeed, could or might do or have done, if living and continuing to act in the trusts hereby reposed in him or them. And my will further is, that the several trustees hereby appointed or to be appointed in pursuance of this my will, or any of the heirs, executors, administrators, or assigns, of them, or any of them, shall not be charged or chargeable with any more of the said trust monies and premises than they respectively shall actually receive, and that one of them shall not be answerable or accountable for the others or other of them, or for the acts, receipts, neglects, or defaults of the others or other of them, but each one for his own acts, receipts, neglects, or defaults only; nor shall they, either or any of them, be answerable or accountable for any banker, broker, or other person, with whom any of the said trust monies may be deposited for safe custody or otherwise, in the execution of the said trusts, nor for the insufficiency or deficiency of any stocks, funds, or securities, in or upon which any of the said trust monies may be invested, in pursuance of and in conformity to this my will, or for any other misfortune, loss, or damage, which may happen in the execution of the aforesaid trusts, or otherwise in relation thereto, unless the same shall happen by or through their own wilful defaults respectively. And also that they the said several trustees so appointed, or to be appointed, shall and may, by and out of the monies which shall come to their respective hands, by virtue of the trusts aforesaid, retain to and reimburse himself and themselves, and allow to his and their co-trustee and co-trustees all costs, charges, and expenses which they or any of them may respectively sustain or expend, or be put unto, in or about the execution of the trusts aforesaid, or in any matter relating thereto. And, lastly, I do hereby revoke all former wills by me at any time heretofore made, and declare this only to be my last will and testament.



## No. 2.

*A Will disposing principally of real Property in Shares,  
among Children and Grandchildren. (1)*

THIS is the last will and testament of me J. C. of N. in the parish of S. in the county of Middlesex. I give and devise unto J. F. and W. A. and J. C. all my freehold messuages, lands, tenements, and hereditaments whatsoever, to hold unto

Of devises to  
children, and  
grandchildren.

(1) Where there is an immediate devise to all the children or grandchildren, or children and grandchildren, by a general description, which vests the property in possession upon the death of the testator, and is, therefore, then distributable, none but those in existence at the time, and answering the description, can take: the fund is then disposed of, and distributed; and consequently the after-born children are excluded. But if the vesting in possession be postponed, so that no distribution need take place at the death of the testator, then all who answer the description, not only at the death of the testator, but born afterwards, and before the fund is to vest in possession, shall take; the general description includes all: and until the period of distribution arrive, none are excluded, *Hughes v. Hughes*, 3 Bro. C. C. 434. *Barrington v. Tristram*, 6 Ves. Jun. 345. *Walker v. Shore*, 15 Ves. 122. *Crone v. Odell*, 1 Ball. and Beatty 483. This rule is the same in grants as in wills. In all grants of estates in land there must be a person in existence to take at the time the estate vests by the grant; therefore, in the case of a conveyance to one and his children and their heirs, if he has children at the time, the father and all his children take jointly in fee; but if he has no child, the father alone takes: an after born child cannot take because the gift was immediate. So if a *devise* be to a man and his children, if he has children at the time, the expressed intent of the testator can take effect, according to the rule of the common law; but if A. *devise* his land to B. and his children, and B. hath not any issue at the time of the devise, he takes an estate tail; for the intent, which is the guide in the construction of a will, is clear that the children are to have an estate; and as immediate devisees they cannot take, because they are not *in rerum natura*, and by way of remainder they cannot take, for the deviser designed to give an immediate estate; therefore, the word *children* shall in such a case operate as a word of limitation, as if the gift had been to B. and the issue of his body. See *Wild's case*, 6 Rep. 16.

On these general principles the law is settled that where a gift by will is immediate, it must operate accordingly. But where a devise or gift is to one for life, remainder to the children, or where the distribution is postponed to a future time; then the children born during the life, or before the time appointed for distribution, become entitled. *Graves v. Boyle*, 1 Atk. 509. *Haughton v. Harrison*, 2 Atk. 329. *Attorney-General v. Crispen*,

them the said J. F. and W. A. and J. C. and their heirs, to the uses, upon the trusts, for the intents and purposes, and under and subject to the powers, provisos, limitations, and declarations hereinafter expressed, limited, and declared, of and concerning the same, that is to say, as to for and concerning all that my freehold messuage or tenement in which I now reside with the chaise-house, wood-house, stable, and garden thereunto belonging, and also all that my freehold messuage or tenements, being No. 5, in N. street aforesaid, with the garden behind the same; now in the tenure of ———, and also all that my freehold messuage or tenement, being No. 4., in N. street aforesaid, with the garden thereunto belonging, now in the tenure of ——— together with all the fixtures and appurtenances to the said messuages or tenements and premises, or any of them, belonging, to the use of the said trustees, their heirs and assigns, during the natural life of my wife Sarah, upon trust from time to time, during the continuance of that estate, to cause the same premises to be kept in good substantial repair, and to be kept insured from loss or damage by fire, to the full value thereof, or as near thereto as may be, so as that in case any such loss or damage shall happen, the money to be received upon or by means of such insurance, may be laid out in reinstating the same, and to retain or apply so much of the yearly rents, issues, and profits of the same premises as shall be necessary for the respective purposes aforesaid; and subject and without prejudice to the trusts hereinbefore declared, upon trust to pay unto or empower my said wife to receive the rents, issues, and profits of the same premises, or so much thereof as shall remain unapplied for the purpose aforesaid, to and for her own use and benefit; and from and immediately after the decease of my said wife; to the use of my four children, William, Henry, James, and Elizabeth, as tenants in common, and the several heirs of their respective bodies; and in case there shall be a failure of issue of any of such children, then as to the share or shares of him, her, or them, whose issue shall so fail, to the use of the others

Devise of testator's freehold messuages, &c., to trustees.

To keep the same in repair, and insured from fire.

Limitation creating a tenancy in common, in tail, with cross remainders.

1 Bro. C. C. 386. *Baldwin v. Carver*, Cowp. 309. *Andrews v. Partington*, 3 Bro. C. C. 401. *Pulsford v. Hunter*, 3 Bro. C. C. 416.

Under a bequest to children, grandchildren are not entitled, except from necessity; as, if the will would be otherwise inoperative. Or, where the testator has clearly shewn by other words that he does not use the word *children* in the proper sense, but according to a more extensive signification. *Radcliffe v. Buckley*, 10 Ves. Jun. 195. by the Master of the Rolls, Sir W. Grant. *Crone v. Odell*, 1 Ball and Beatty, 449.

of them, as tenants in common, and the several heirs of their respective bodies; and in case there shall be a failure of issue of the bodies of all such children but one, then to the use of such one child, and the heirs of his or her body; and in default of such issue, to the use of my own right heirs for ever. And as to for and concerning all those my three freehold messuages or tenements, numbered 1, 2, 3, situate in N. street, aforesaid, and now in the several occupations of —, with the gardens and appurtenances thereunto respectively belonging, to the use of the said trustees, their heirs and assigns, during the natural life of my said son William, upon trust to support and preserve the contingent remainders, hereinafter limited, from being defeated or destroyed, and upon further trust from time to time, during the continuance of that estate to cause the said premises to be kept in good and substantial repair, and to be kept insured from loss or damage by fire, to the full value thereof, or as near thereunto as may be, so as that in case any such loss or damage shall happen, the money to be received upon or by means of such insurance may be laid out in reinstating the same, and to retain or apply so much of the yearly rents, issues, and profits of the said premises as shall be necessary for the respective purposes aforesaid; and subject and without prejudice to the trusts hereinbefore declared, to pay the rents, issues, and profits of the same premises, or so much thereof as shall remain unapplied for the purposes aforesaid, for the use and benefit of my said son William, during his natural life, and from and immediately after the decease of my said son William, to the use of all and every the child and children,—[Same clause as before for creating a tenancy in common in tail, with cross remainders,]—and in default of such issue, to the use of my said sons Henry and James, and daughter Elizabeth, as tenants in common, and the several heirs of their respective bodies,—[Same clause as before, making a tenancy in common, in tail, with cross remainders]—and in default of such issue, to the use of my own right heirs for ever. And as to for and concerning all those my seven freehold messuages or tenements, numbered 1, 2, 3, 4, 5, 6, and 7, situate in —, with the out-houses, gardens, and appurtenances thereunto respectively belonging, as the same are now in the several occupations of —, to the use of — and —, their heirs and assigns, during the natural life of my said son Henry, upon trust to support and preserve the contingent remainders hereinafter limited from being defeated or destroyed, and upon further trust from time to time [same

clause for keeping premises in repair and insuring from fire, &c.] and subject and without prejudice to the trusts hereinbefore declared upon trusts to pay such rents, issues, and profits of the last mentioned premises, or so much thereof as shall remain undisposed of for the purposes aforesaid, into the proper hands of my said son Henry, for his personal support and maintenance, for which his receipts in writing, signed with his proper hand, shall alone be a sufficient discharge. Provided, and my will is, that in case my said son Henry shall alien, or charge, or attempt to alien or charge such his beneficial interest, in such rents, issues, and profits, as aforesaid, or any part thereof, then and from thenceforth he shall cease to have any benefit thereout, and such rents, issues, and profits, as he my son Henry would otherwise have been entitled to, shall for the then residue of his life go and be paid unto the person or persons who for the time being shall be entitled to the remainder or reversion of the same hereditaments and premises, expectant on the determination of the said estate so limited to the use of the said trustees, their heirs and assigns, during the life of my said son Henry, as aforesaid; and from and immediately after the decease of my said son Henry, to the use of all and every the child and children of the body of my son Henry, lawfully to be begotten, as tenants in common—[as before with cross remainders]—and in default of such issue, to the use of my said sons William and James, and daughter Elizabeth, as tenants in common,—[as before]—and in default of such issue, to the use of my own right heirs for ever. And as to for and concerning all those my eight freehold messuages or tenements, numbered 1, 2, 3, 4, 5, 6, 7, 8, situated, &c. with the appurtenances thereto respectively belonging, and now or late in the several occupations of, &c. to the use of the said trustees, their heirs and assigns, during the natural life of my said daughter Elizabeth, upon trust to support and preserve, &c. and upon further trust [to keep premises in repair and insured from fire, as before,] and subject, and without prejudice to the trusts hereinbefore declared upon trust to apply such rents, issues, and profits of the same premises, or so much thereof as shall remain undisposed of for the purposes aforesaid, into the proper hands of my said daughter, for her sole and separate use and benefit, exclusively of any husband with whom she may intermarry, and so as the same may not be subject or liable to the power, controul, debts, or engagements of any such husband; and her receipt alone to be a sufficient discharge for the same, notwithstanding.

Proviso against charging or incumbering.

Clause giving the exclusive enjoyment to a married daughter.

Power to make  
building leases  
and common  
leases.

standing any coverture she may be under. And in case my daughter shall at the time of my death be in her minority, and unmarried, then to apply the same for or towards her maintenance and education, or if my said wife shall be living, to pay the same over to her my said wife, in order that she may apply the same for that purpose, and from and immediately after the decease of my said daughter, to the use of all and every the child and children of the body of my said daughter, lawfully to be begotten, as tenants in common—[limitation to her children as before, remainder over on failure of issue to testator's sons in the same manner as before]—provided always, and my will is that it shall and may be lawful to and for the said trustees, and the survivors and survivor of them, and the executors or administrators of such survivor, by indenture or indentures under their or his hands and seals, or hand and seal, respectively to demise or lease such part or parts of the said vacant ground as may not be built upon at my death, unto any person or persons who may be willing to build upon the same or any part or parts thereof, for any term or number of years not exceeding 61 years from the making thereof respectively, yet so as that no erection or building shall be erected, whereby the said street, called St. James's Street, shall be rendered of less width in any part than 30 feet; and to demise or lease all or any of the residue of the hereditaments hereinbefore devised, unto any person or persons, for any term or number of years not exceeding 21 years from the time of the making thereof, so as in every such lease so to be made, whether for building or not, there be reserved and made payable the best and most improved yearly rent or rents that can be reasonably had or gotten for the hereditaments and premises thereby demised, to be incident to and go along with the immediate remainder or reversion of the said premises, without taking any fine, premium, or foregift, for the making or granting of any such lease or leases respectively, and so as that in every such lease there be contained a clause of re-entry, for non-payment of the rent or rents thereby reserved, and so as that no lessee or lessees be by any such lease or leases authorised or empowered to commit waste, or exempted from punishment for committing the same, and so as the lessee, or respective lessees to whom any such lease or leases shall be so made, shall and do execute a counter-part or counter-parts thereof respectively, and enter into a covenant for payment of the rent or rents so to be reserved. And as to for and concerning all those my freehold messuages or tenements, situated

in ———, and all those my freehold messuages, situate in ———, and all other my hereditaments hereinbefore devised to the said (trustees) and their heirs, whereof no use is hereinbefore limited or declared, with their appurtenances, to the use of them, the said trustees, their heirs and assigns, for ever, but nevertheless upon the trusts hereinafter declared concerning the same: and I give and bequeath my leasehold messuage and tenements, situated behind the three last mentioned messuages, and also my leasehold messuages and tenement, situate in ———, with their respective appurtenances, unto the said trustees, their executors, administrators, and assigns, for all such term or terms of years, as I shall have therein at the time of my decease, but nevertheless upon the trusts hereinafter declared concerning the same. And as to for and concerning as well the freehold messuages, tenements, and hereditaments hereinbefore lastly mentioned, or referred to, as the said leasehold messuages, tenements, and premises, I will and declare that the trustees or trustee thereof respectively, for the time being, do and shall, so soon as conveniently may be after my decease, sell and absolutely dispose of the same together or in parts, by public auction or private contract, as to them or him shall seem expedient, for the best price or prices that can be reasonably procured for the same; and as to the money arising by and from such sale or sales, and also as to the clear yearly rents, issues, and profits, arising from the said freehold and leasehold premises so hereinbefore directed to be sold as aforesaid, in the mean time, until the same shall be sold, I will and declare that the same respectively shall be deemed to be part of my personal estate, and go according to the dispositions thereof hereinafter contained; and I direct that the receipts of the said trustees, their heirs, executors, administrators, or assigns, for the money arising by any such sale or sales, shall be good discharges for the same, or so much thereof as shall be therein expressed to be received; and that the purchaser or purchasers of the same several hereditaments and premises, or any part thereof, his, her, or their heirs, administrators, or assigns, shall not be answerable for any loss, misapplication, or non-application thereof. And as to all my goods, chattels, and personal estate, not by this my will specifically disposed of, I give the same unto the said trustees, upon trust, in the first place to pay thereout all my just debts, (including all such ground-rents and premiums of insurance as may be owing from me at the time of my death,) and my funeral and testamentary charges; and in the next

Direction to trustees to sell freehold and leasehold property, and to convert all into personalty, to pay thereout funeral and testamentary charges, and premiums of insurance; to finish certain houses not completed, and to lay out the surplus in the funds, to accumulate till the youngest son arrives at 21, and then to divide it among the children.



place, the pecuniary legacies given by this my will ; and after making all such payments, to lay out so much of the residue as may be necessary in finishing any messuages or other buildings which may happen to be building by me on the said vacant ground, at the time of my death ; and to lay out the surplus, if any, in the purchase of 3 per cent. consolidated bank annuities, in the names of them the said trustees, or the survivors or survivor of them, or the executors or administrators of such survivor ; and as to such bank annuities, I will and direct that they the said trustees or trustee thereof, for the time being, do and shall place out the dividends or interest arising thereupon, from time to time, until my said son James shall attain the age of 21 years, (or in case he shall die before that age, until the period shall arrive when he would, if living, have attained that age,) in the purchase of like annuities, so as to cause as great an accumulation of stock as may be ; and when and so soon as my said son James shall attain the said age, or the period shall arrive when he would, if living, have attained that age, then to transfer one fourth part of such bank annuities as shall have been so purchased as aforesaid, unto my said son William, his executors or administrators ; one other fourth part unto my said son Henry, his executors or administrators ; one other fourth part unto my said daughter Elizabeth, her executors or administrators ; and the remaining fourth part unto my said son James, his executors or administrators ; and I give and bequeath to my said wife all my household goods and furniture, plate, rings, watches, china, ornaments, linen, and wearing apparel, books on the subject of divinity, prints, and such of my drawings as are in frames. And I do hereby will and declare that such stock in the public funds as may at my death be standing in the joint names of my said wife and myself shall be hers absolutely. I give and bequeath to my son Henry all my books, manuscripts, papers, and drawings, (except those given to my wife, and such books as contain matters relating to my business unfinished, and my books of account, and books relative to my estates, all which I direct shall be retained by my executors.) I will that my executors do pay out of my personal estate 200*l.* for the board and education of my nephew H. T. until he shall be fit to be put out apprentice, and then that they do pay the further sum of 200*l.* with him as an apprentice fee. (2) I give to my son

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(2) If a legacy be given for the benefit of an infant in one way, and it cannot be applied in that way, it may be applied for his benefit in another



William 20*l.* to be laid out for him as my executors hereafter named shall think proper. I forgive my son-in-law W. T. the debt of 100*l.* which he owes to me, and direct my executors to deliver up to him the bond whereby the same is secured to me, to be cancelled. (3) I do hereby nominate, constitute, and appoint the said J. A., W. A., and J. C., executors of this my last will and testament; and I give to them the sum of 50*l.* each, as some compensation for their care and trouble in the execution of the trusts hereby in them reposed; and direct the same to be paid to, or retained by them, as soon as conveniently may be after my decease. I give and bequeath to my brother and to my two sisters and to my wife's son——the sum of 20*l.* each to be paid to them respectively, as soon as conveniently may be after my decease. And I appoint my said wife guardian of such of my children as shall be under the age of 21 years at my decease; and after her decease I appoint my said trustees and the survivors or survivor of them the guardians or guardian of such of my children as may be then minors until they respectively shall arrive at the age of 21 years, and I do direct—[clause indemnifying the trustees, &c.]

Debt released.

Executors appointed with a legacy to each for care and trouble.

Appoints his wife guardian, and after her decease the trustees.

In witness, &amp;c.



### No. 3.

#### *A will disposing of real and personal Estate by way of Provision for Children.*

THIS is the last will and testament of me, S. K. of ——, &c. I desire to be buried in the vault which I have

Directions for burial.

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way, as if it be to put him into orders, and he becomes a lunatic;—and where a legacy is given as an apprentice fee, if the boy is not put out apprentice, he will be entitled to this legacy when he comes of age. *Barton v. Cooke*, 5 Ves. J. 461.

(3) If W. T. should die in the testator's life-time, this legacy would not lapse. 1 Ves. J. 49., 1 P. Wms. 83. But it is to be observed, that such a legacy will not prevail in equity against creditors; it is good, however, against executors; and if an action be brought for it by executors, the Court will grant an injunction. 3 Atk. 581. 1 P. Wms. 86. (n. 2.)

Family grave-  
stones to be  
preserved.

Jewels, plate,  
linen, china,  
household  
goods and  
furniture, with  
implements of  
husbandry and  
stock of wines.

Charitable be-  
quests.

lately made in the parish church of ———, in the said county; and I earnestly request that my wife and son and all those who for the time being shall be entitled to the rents and profits of my messuages, lands, tenements, and hereditaments hereinafter devised, will pay due attention to the keeping up of those graves and grave-stones of my family, which are in the church-yard of F. in the said county, and to which grave-stones I have lately put head and foot-stones. I give and bequeath unto my dear wife, and to my only son S. K., and to my son-in-law M. R., and to my only daughter R. M. D. his wife, the sum of ———*l.* a piece for mourning; and for the like purpose I give unto C. my son's wife the sum of ———*l.* and to her two sons, U. S. W. and I. S. W. ———*l.* a-piece, and to my niece A. L. the sum of ———*l.* I also give and bequeath unto my said wife all the ornaments of her person, and all my jewels, plate, linen, china, and all my household goods and furniture whatever and wheresoever, and all my books, and all my horses and other cattle, and my chaise, carts, carriages, and implements of husbandry, and also all my stock of wines and other liquors whatever, to hold to her as her own absolute property. I also give to my said wife the use and enjoyment of all my pictures, prints, and drawings, during her life; and from and after her decease I give to my daughter R. M. D. the picture of herself; but the rest of my pictures, and all my prints and drawings, I give to my said son S. K. I give and bequeath to I. N. of T. in the said county, esquire, and to C. B. the younger of W. in the said county, esquire, the sum of ———*l.* a-piece, to be laid out in the purchase of some small piece of plate, to be kept by them respectively, as a memorial of the friendship subsisting between us. I order and direct the sum of ———*l.* to be divided as my wife shall think proper, or in case of her death as my said son shall think proper, among such of the poor persons resident in or belonging to the parish of St. L. in I——— aforesaid, where I live, as shall happen to be upon my Christmas list, and to have received a small donation by my order at the Christmas preceding my death. I likewise order and direct the sum of ———*l.* to be divided or given as my wife shall think proper, to or amongst any poor family or families of the aforesaid parishes of ——— and ——— which shall seem to her to be most deserving of such reward or assistance: and the rest, residue, and remainder of my personal estate not hereinbefore specifically bequeathed, after payment of my debts, legacies, funeral, and testamentary charges, I give and bequeath to the said G. H. and C. B., their

executors, administrators, and assigns, upon and for such and the like trusts, intents, and purposes as are hereinafter mentioned and declared respecting the rents, issues, and profits of the hereditaments hereinafter given and devised to them for the term of 500 years, during the continuance thereof. I nominate and appoint my said wife M. K. sole executrix of this my last will and testament, thinking it may be more readily executed by one person than by two; yet I earnestly request and hope that my said son will to the utmost of his power aid and assist his mother in the due execution thereof. And as to for and concerning my messuages, farms, lands, tenements, and hereditaments next hereinafter mentioned, (that is to say) ——— I give, devise, and confirm the same, with their respective appurtenances, unto and to the use of my said wife for and during the term of her natural life; and from and after her decease unto and to the use of my said son S. K. his heirs and assigns, for ever. And as to for and concerning my messuage or tenement, farm, lands, and hereditaments in C——— aforesaid, now in the occupation of ———, I give and devise the same, with their respective appurtenances, unto and to the use of my said wife for and during the term of her natural life; and immediately from and after her decease then as to for and concerning the same premises, and from and immediately after my own decease as to for and concerning the following estates, (that is to say) my freehold messuages, &c. [various parcels and descriptions of freehold property] I give and devise the same, with their respective appurtenances, unto and to the use of them the said G. N. and C. B., their executors, administrators, and assigns, for and during the term of 500 years, to be computed from the day of my decease, and from thence next ensuing, and fully to be complete and ended without impeachment of waste; but nevertheless upon and for the trusts, intents, and purposes hereinafter expressed and declared concerning the same term; and (subject as aforesaid) from and immediately after the determination of the said term of 500 years, and in the mean time subject thereunto and to the trusts thereof, unto and to the use of the said S. K. and his assigns, for and during the term of his natural life without impeachment of waste, and from and after his decease [to the children of the said S. K. the son in strict settlement, remainder to the testator's right heirs.] And as to for and concerning the said term of 500 years hereinbefore limited to the said G. N. and C. B., their executors, administrators, and assigns as aforesaid, I will and declare that the said G. N. and C. B.

Estates to  
wife for life,

A term of 500  
years created.

Trusts of the  
term declared.

To make up the deficiency of the personal estate in paying funeral and testamentary charges, and debts and legacies.

And subject thereto to pay an annual sum to his daughter, to be increased after the death of the testator's widow, and to be paid to her separate use.

their executors, administrators, and assigns, do and shall stand and be possessed of the messuages, lands, and hereditaments comprised therein, upon the trusts following, (that is to say) upon trust that they the said trustees, or trustee for the time being, do and shall with and out of the respective rents, issues, and profits of the said hereditaments and premises therein comprised, or by mortgage or sale of a competent part of the same premises for all or any part of the said term, or by both of those means, (1) raise and levy such sum and sums of money as shall be necessary for paying so much of my debts, legacies, funeral, and testamentary charges as my personal estate, not specifically bequeathed, may happen to fall short in payment of, and do and shall apply such money so to be raised in discharge thereof accordingly, and subject thereto, upon trust that they the said trustees, or trustee for the time being, do and shall by both or either of the aforesaid means raise, levy, and pay the following clear annual sum of money during the life of my said daughter S. D. (that is to say) the annual sum of—£. (if my wife shall survive me) as long as my said daughter and my said wife shall both be living; and in case my said daughter shall survive my said wife, then the annual sum of—£. during the residue of the life of my said daughter; but if my said wife shall die in my life-time, then the said annual sum of—£. to commence from the time of my death; the said annual sum of—£. or—£. as the case shall happen as aforesaid, to be paid by equal half-yearly payments, on the 24th day of June and 25th day of December in every year, clear of taxes, and without deduction, the first payment of the said annual sum of—£. to be paid on such of the said days as shall first happen next after my decease, in case my said wife shall be living at such day of payment, and the first payment of the said annual sum of—£. to be made on such of the said days as shall first happen next after the decease of the survivor of me and my said wife; and upon trust that they the said trustees, or trustee for the time being, do and shall pay such of the said annual sums of—£. and—£. as shall be subsisting or ought to be raised as aforesaid, unto such person or persons only, and for such intents and purposes only as my said daughter, by

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(1) These last words seem to be proper, since without such words, or the addition of the plural words "sales and mortgages," it might be doubted whether the trustees having raised the money by mortgage could afterwards sell to pay off that mortgage, however beneficial such an arrangement might be; see 12 Ves. J. 48.

any writing or writings under her hand shall direct or appoint, notwithstanding her present or any future coverture; and for want of such direction or appointment then do and shall, [for the separate use of the daughter, vide *ante*, page 345] and in case my said daughter shall have one or more child or children, then upon trust that they the said G. N. and C. B., their executors, administrators, and assigns, do and shall, after the decease of my said daughter, but not before, and when and as any such child or children shall attain their respective age and ages of 21 years, (if my said daughter shall then be dead,) by both or either of the aforesaid means (but subject and without prejudice to the trusts hereinbefore declared concerning the same term) raise and levy such sum or sums of money, for the portion or portions of such child or children, as is or are hereinafter mentioned (that is to say) if there shall be only one child of my said daughter, who shall attain the said age of 21 years, then the sum of —l. for the portion of such one child: if there shall be two such children, and no more, who shall live to attain that age, then the sum of —l. for the portions of such two children, the sum to be equally divided among them; and if there shall be three or more such children, who shall live to attain that age, then the sum of —l. for the portions of such three or more of them, the same to be equally divided between or among them; such portion or portions as is or are hereby provided for such child or children, to become a vested interest, or vested interests, in him, her, or them respectively, as and when he, she, or they respectively shall attain the age of twenty-one years, after the decease of my said daughter, to be paid at the end of six calendar months next after their attaining such age and ages, with interest for such six months, at the rate of —l. per cent. per annum. But as to such of them as shall attain that age in the life-time of my said daughter, the payment of their portions shall be postponed until the end of six calendar months, next after her decease, and to be paid with like interest for such six last-mentioned months; and upon this further trust, that the said G. N. and C. B., their executors, administrators, or assigns, do and shall, by both or either of the aforesaid means, raise, levy, and pay, such annual sum or sums of money, for or towards the maintenance and education of such child or children of my said daughter, as shall be under the age of twenty-one years, at her decease, as shall be equal to the interest of his, her, or their expectant portion, or respective portions, at the rate of ———— per cent. per annum, until the same shall respectively become vested

And after the death of the daughter, to raise portions for her children, to vary with the number, and to become vested as they attain their ages.

And in the mean time to raise, by way of maintenance for each, an annual sum equivalent to the interest of their respective portions.

And if no child, to take such benefit, then to raise a gross sum to be disposed of among specified persons, according to the daughter's appointment.

Receipts of trustees to be discharges, and the mortgagees and purchasers not to be answerable for the application of the mortgage or purchase monies.

aforesaid. And upon this further trust, that if my said daughter shall not have a child, or having any such child or children, they shall all die under the age of twenty-one years, so as not to become entitled to receive the portion and portions hereinbefore provided for them as aforesaid, then upon trust that the said trustees or trustee, for the time being, do and shall, by both or either of the aforesaid means, (but subject, and without prejudice, as aforesaid,) raise and levy such sum or sums of money, not exceeding in the whole the sum of—£. of lawful money of Great Britain, as my said daughter by any deed or deeds, writing or writings, with or without power of revocation, under her hand and seal, attested by two or more credible witnesses, or by her last will and testament, or by any writing in the nature of her last will and testament, to be signed and published in the presence of and attested by three or more such witnesses, shall, notwithstanding her present or any future coverture, think fit to direct and appoint; and do and shall pay such sum or sums, if any, as shall be so directed to be raised, not exceeding the said sum of—£. as aforesaid, unto or amongst such one or more of the present, or any other son or sons, daughter or daughters, of my said son S. K., at such time or times, and in such share and shares, manner and form, as my said daughter shall by the same, or any other deed, writing or writings, under her hand and seal, with or without power of revocation, so attested as aforesaid, or by such last will and testament, or writing in nature thereof, as aforesaid, direct or appoint. And in order to facilitate any mortgage, or sale of mortgages, or sales of the same messuages, farms, lands, tenements, and hereditaments, or any part or parts of them, for any of the trusts and purposes aforesaid, I hereby declare, that the receipt or receipts of the said trustees or trustee, for the time being, shall be a sufficient discharge, or sufficient discharges, to the mortgagee or mortgagees, purchaser or purchasers of any of the same messuages, farms, lands, tenements, and hereditaments, or of any part or parts thereof, for his, her, or their mortgage or consideration-money, or for so much thereof as in such receipt or receipts, shall be expressed to be received; and that such mortgagee or mortgagees, purchaser or purchasers, his, her, or their executors, administrators, or assigns, shall not afterwards be accountable for any misapplication or non-application thereof, neither shall he, she, or they respectively be concerned to enquire into the necessity of making any such mortgage or sale, for any of the purposes aforesaid. Provided, and my



will further is, that it shall be lawful for the said trustees or trustee, for the time being (with the consent of my said son signified in writing, under his hand, if living, and if not, then at the discretion of them or him, my said trustees or trustee,) to apply so much of the rents, issues, and profits of the premises comprised in the term, as to them or him shall seem expedient, in or for the purposes of repairing or rebuilding any of the messuages or buildings upon the said farm and lands, or improving the same, or any of them, and also to fell, cut down, and dispose of any of the timber or trees growing or being thereupon, for all or any of the last-mentioned purposes; and, subject to the trusts, interests, and purposes, hereinbefore declared, of and concerning the messuages, farms, lands, tenements, and hereditaments, comprised in the said term of 500 years, I declare my will and mind to be, that the said trustees or trustee, for the time being, do and shall, during the first twenty-one years of the said term of 500 years, to be computed from the fifth day of April, or 10th day of October, next preceding my death, lay out and invest, with the consent of my said son, if living, in writing, under his hand, and if not, then at the discretion of such trustees or trustee), the residue and clear surplus of the yearly rents, issues, and profits of the said premises, remaining after paying such the said annual sums of ——.l. or ——.l. for the separate use of my said daughter; and such annual sum as shall, for the time being, be applicable for such maintenance as aforesaid, and the interest of any such portion or portions hereinbefore directed to be raised as shall be carrying interest, and also of any such mortgage or mortgages as may be made in pursuance of the trusts hereinbefore declared, and after application of such sum or sums of money, as it may be thought proper to dispose of, for such rebuilding, repairing, or improving, as aforesaid, in the public stocks or funds of Great Britain, or in or upon securities of that government, or real securities in England, at interest, and in like manner, from time to time, to invest the dividends, interest, or annual proceeds of such stocks, funds, or securities, so as within that period to produce as great an accumulation of capital as reasonably may be in the nature of compound interest. Provided, nevertheless, and I declare my mind and will to be, that such investments shall cease at the end of 10 or 15 years of the said term of 21 years, if my said son shall in his life-time so direct the same, by any writing under his hand, to be attested by two or more credible witnesses; and

Trustees empowered with consent of the son to apply necessary sums out of the rents and profits in repairing and rebuilding.

And subject to the trusts above-mentioned, to invest the surplus rents, and profits, in the funds, during the first 21 years of the term after testator's death.



Proviso for the  
ceasing of the  
term.

then I will and direct that the said trustees or trustee, for the time being, do and shall stand possessed of and interested in such stocks, funds, or securities, as shall have been so from time to time purchased, upon the trusts hereinafter declared concerning the same. Provided, that when, and so soon as all and every the trusts hereinbefore declared concerning the said term of 500 years, shall in all things have been fully performed, satisfied or discharged, or shall have become incapable of being carried into execution, and they, the said G. N. and C. B., and each of them, and the executors, administrators, and assigns of them, and each of them, shall be fully reimbursed and satisfied all costs, charges, and expenses, occasioned by or relating to the trusts of the said term of 500 years, then the same term, or so much as shall remain undisposed of for the purposes aforesaid, shall cease, determine, and be absolutely void to all intents and purposes whatever, (any thing herein, &c.) Provided also, and I hereby declare that it shall and may be lawful to and for my said son S. K., from time to time, and at all times during his natural life, and after his decease to and for the person or persons, who, for the time being, shall, under and by virtue of the limitation hereinbefore contained, be entitled to the hereditaments comprised in the said term of 500 years, either in possession, or in remainder, after the determination of the same term, if he, she, or they shall have attained the age of 21 years, and if not, then for his, her, or their guardian or guardians, [power to lease, see before, p. 346.] And as to for and concerning all my copyhold messuages, farms, lands, tenements, and hereditaments, with their respective appurtenances, not hereinbefore disposed of for the benefit of my said wife, during her life, with remainder for the benefit of my said son and his heirs, I give and devise the same unto and to the use of the said S. K., my son, his heirs and assigns for ever; yet nevertheless upon such trusts, intents and purposes as will correspond with the uses, trusts, interests, and purposes hereinbefore expressed and declared, of and concerning my said freehold messuages, farms, lands, tenements, and hereditaments, comprised in the term of 500 years, either in possession, or in remainder, after the decease of my said wife, and with which estates such copyhold premises are respectively held and enjoyed, and under and subject to such and the same powers, provisos, and declarations, or as near thereto as may be, and the different nature of the tenure, and the rules of law and equity will admit of. And as touching such stocks, funds,

and securities as shall have been so purchased as aforesaid, I will and declare that the said trustees thereof, for the time being, do and shall stand possessed of, and interested in the same, upon the trusts following, that is to say, upon trust that they or he do and shall pay unto, or empower my said son (if living,) or his assigns, to receive the dividends or interest thereof, during his natural life, and from and immediately after his decease, (or in his life-time, if he shall so direct, by any such deed or writing as hereinafter is mentioned,) do and shall pay or transfer such stocks, funds, or securities, unto such one child, or to and amongst such two or more of the children of my said son, (other than and except an eldest or an only son, for the time being,) at such age or time, and if more than one, at such ages or times, in such shares and proportions, and in such manner and form as my said son, by any deed, &c. shall direct or appoint; and in default of such direction or appointment, then the same shall become vested in such two or more of the children of my said son, (other than and besides such eldest and only son), as shall attain the age of 21 years, in equal shares: but if there shall be no more than one such child, (other than and besides such eldest or only son,) who shall attain such age, then one moiety only thereof shall vest in such child, and the other moiety shall be considered as having vested in my said son, and be paid or transferred accordingly to his executors, administrators, or assigns: and in case there shall be no child of my said son, (other than, &c.) who shall attain the said age, then the whole of such stocks, funds, or securities, shall be considered as having vested in my said son, and be paid or transferred accordingly, to his executors, administrators, or assigns; and as to any dividends or interest which may arise in respect of such last-mentioned portion or portions, from the decease of my said son, until the vesting, thereof, I will and direct that such dividends or interest shall be invested in such stocks, funds, or securities, [to accumulate as before.]

Trusts of the accumulated stock.

To permit the son to receive the dividends for life, and after his death to go according to his appointment among his younger children.

## No. 4.

*A Will, comprising various dispositions of real and personal Estate, partly of testator's own estate, and partly in performance of various trusts and obligations imposed on him by antecedent settlements.*

Recital of provisions and limitations of real and personal property, under settlement by deeds and wills.

**THIS** is the last will and testament of me J. N., of ———  
 Whereas under and by virtue of the settlement made previous to my marriage with Mary, my wife, (then Mary S.) certain hereditaments at W———, (whereof she was seised in fee simple,) stand limited to the use of me for life, with remainder to the use of the trustees therein named, and their heirs during my life, in trust to preserve the contingent remainders; remainder to the use of my said wife for life; remainder to the use of all and every the child and children of our marriage, in tail, with cross remainders; remainder to such uses as my said wife shall, by such deed or will, as is therein mentioned, appoint, and in default of such appointment to the use of her right heirs; and by the same settlement her portion, consisting of the sum of 1500*l.*, was agreed to be vested in the trustees therein named, upon trust, after the solemnization of the said marriage, to pay the interest thereof to me during my life, and after my decease to my said wife for her life, and after the decease of the survivor of us upon such trusts, as to the principal money, for the benefit of the children of the said marriage, as therein mentioned; and in case there should be no such child or children, or being such, all of them should die before such ages or times as are therein mentioned, upon trust to apply the said sum of 1500*l.* as my said wife should, by such deed or will, as is therein mentioned appoint; and in default of such appointment, to her executors, administrators, or assigns. And my father, Richard N., thereby covenanted, that in case the then intended marriage should take effect, and the said Mary should survive me, he, his heirs, executors, or administrators, would yearly pay unto her, during her life, such sum of money, as, with the clear yearly produce of her said real and personal estate, thereby settled, or agreed to be settled, would make up the clear yearly sum of 200*l.*; and my said father thereby covenanted to pay the sum of 2000*l.* to the said trustees herein named, upon such trusts, for the benefit of the children of the

said marriage, as are therein mentioned : and whereas the said portion or sum of 1500*l.* was received by me, and yet continues in my hands, and there hath not as yet been any issue of the said marriage ; and whereas my said late father, Richard N., by his last will and testament, in writing, bearing date the — day of —, 17—, after confirming the said settlement, and ordering his debts to be paid out of his personal estate, devised his freehold messuages, lands, and tenements at B —, in the county of —, to the use of a trustee therein named, for the term of 500 years, upon the trusts thereafter declared, and hereinafter in part mentioned ; remainder to the use of me for life, without impeachment of waste ; remainder to the use of trustees, and their heirs, during my life, in trust to preserve the contingent remainders : remainder to the use of my first and every other son successively, in tail male ; remainder to the use of my daughters, as tenants in common, in tail, with cross remainders ; remainder to his nephew, William N., for his life ; remainder to the use of trustees, and their heirs, during the life of the said William N., in trust to preserve the contingent remainders ; remainder to the use of James N., son of the said William, for his life ; remainder to the use of trustees and their heirs, during his life ; in trust, to preserve the contingent remainders ; remainder to the use of the first and every other son of the said James N. successively, in tail male ; remainder to the use of the male heir, who should be lawfully entitled, for the time being, to the ancient estate, at G. belonging to the N —'s, for the life of such male heir ; remainder to the use of trustees, and their heirs, during the life of the said male heir, to preserve the contingent remainders ; remainder to the use of the first and every other son of the said male heir successively in tail male ; reversion to the use of his (my said father's) right heirs. And he gave to his wife Jane an annuity of 100*l.* for her life, to be paid out of his real estate ; and declared that the said term of 500 years was so limited to the use of the trustees thereof, as aforesaid, for securing the payment of the said annuity, and for raising all such sum or sums of money as he should have to pay in consequence of his covenant in my said marriage ; and he gave his leasehold estate to trustees upon trust, to permit the person, who for the time being should be in possession of his freehold estates, by virtue of his will, to receive the rents and profits thereof, subject to the payment of the said 100*l.* annuity, and the sum he had engaged to pay, under my said settlement ; and he gave all his monies at in-

Limitations by way of strict settlement recited.

Dispositions of personalty by his father's will recited.

terest, and securities for the same, and the interest thereof and 500*l.* stock in the ———canal, (200*l.* whereof then stood, and is yet standing in my name,) and all profits and dividends belonging to the same, and also all his silver plate, household furniture, beds, bedding, pictures, prints, watches, books, live cattle, husbandry gears, to trustees, upon trust, to pay out of his said monies his debts, funeral expenses, the probate of his will, and in the next place to pay me the sum of 500*l.* upon my succeeding to the rectory of G. by three equal payments, in each year, next after my institution, for the purpose of being laid out at my discretion, in the improvement of the glebe lands and buildings; and as to the remainder of the money, to lay out the same, with the approbation of the person, who, for the time being, should, by virtue of his will, be in the possession of his real estate, in the purchasing of freehold premises, in the county of ———, to be conveyed to the trustees, upon the same trusts as the other real estates, by virtue of his will, were limited to, or such of them as should be capable of taking effect: as to husbandry gear, and quick goods, they were to be sold, and the money arising therefrom to be invested in the purchase of freehold lands, within the county of ———, for the uses limited of his other estates, by his said will; and as to household furniture, beds, bedding, rings, watches, plate, pictures, &c. he gave to his said wife such parts thereof, as he should particularise in a schedule, for her life; and as to such parts thereof as should not be so directed, and those so directed after her death, the trustees were to permit the person for the time being, entitled to his real estate, to have the use thereof; and, until such purchases as aforesaid should be made, the trustees were to continue the monies at interest, or to call in and replace the same, either on mortgages, or invest the same in the public funds, and pay or permit the person lawfully in possession, for the time being, of his real estates, to receive the interest and dividends of the same; and as to the said 500*l.* canal stock, the trustees were to permit the person or persons, who, for the time being, would be entitled to the premises, to be purchased as aforesaid, or until purchased, the interest of the money intended to purchase the same, to receive the dividends thereof, and afterwards to transfer the principal to such person and persons, his, her, and their executors, administrators, and assigns, in whom the premises so to be purchased, (when purchased), his or their heirs or assigns, should become absolute at law, by virtue of his will. And he made me (subject, and without prejudice to any of the trusts therein con-

tained,) executor of his said will. And whereas my said father departed this life in the year ———, without revoking or altering his said will, leaving me his only child and heir at law; and, shortly after his decease, I proved the same will, in the Prerogative Court of Canterbury. And whereas, exclusively of the specific estates, to the enjoyment whereof I am entitled for my life, under my said father's will, I remain possessed of the said sum of 500*l.* canal stock, and of the sum of 70*l.* like stock, which my said father purchased after the making of his said will, and the residue of my said late father's personal estate has been permitted to remain in my hands; and it will appear by my accounts, as executor of my said father's will, that such residue amounts to the sum of ———*l.* And whereas the said Jane, my late mother, departed this life in the year ———, having first duly made her last will and testament, whereby she gave to me all arrears which should be due, in respect of her said annuity of 100*l.* at the time of her death, upon my paying to her relation, Mary R———, an annuity of 10*l.* during her life; and gave the use of her watch to me for life, and at my decease the same, and the rings, pictures, and trinkets, whereof she was possessed, she directed to go to the uses thereof directed by her said husband's will: and I having elected to take the benefit of the bequests in her said will, have paid the said annuity of 10*l.* to the said Jane R———, up to the last day of payment thereof, preceding the date of this my will. And whereas I am desirous, that as well the trust in my said marriage settlement, regarding the said portion or sum of 1500*l.* as those of my said father's will, touching his personal estates, or such and so many thereof as remain to be performed, and also the trusts in my said mother's will, touching the specific chattels therein mentioned, should be performed and carried into execution, I therefore direct that ——— and ———, my executors hereinafter appointed, do and shall, as soon as conveniently may be, after my decease, pay the sum of 1500*l.* in satisfaction of the debt owing from me in respect of my having so received my wife's portion of that amount as aforesaid, with interest for the same, after the rate of 5*l.* for 100*l.* for a year, to the trustees or trustee, for the time being, in my said marriage settlement, upon such of the trusts therein declared, concerning the same respectively, as shall be then subsisting, or capable of taking effect: and I further direct, that my said executors do and shall, so soon as conveniently may be after my decease, transfer the said sum of 500*l.* navigation stock, unto the trustees or trustee, for the time being, who shall be

Debits himself as his father's executor on account of the residue of his personal estate.

That testator is desirous of performing the trusts of his marriage settlement, and his father's and mother's will before mentioned. Direction to his own trustees and executors, to make good the sum of 1500*l.* which he owes to the trustees of his marriage settlement.

To transfer the 500*l.* navigation stock to the trustees of his father's will.



To transfer the specific things, which, under his mother's will, he was to enjoy for life, to the persons entitled to receive the same after him.

To pay over the sum stated in his (the testator's) account, as his father's executor, to be the balance owing from him, as such executor, in respect of the residue of his father's personal estate, to the person or persons entitled to receive the same under his father's will.

To replace some articles of his father's furniture sold by him.

And to pay over a sum left by his father to a charity.

then entitled to receive the same, under my said father's will, upon such and the same trusts therein declared, concerning the same respectively, as shall be then subsisting, or capable of taking effect; and also that they, my said executors, do and shall, so soon as conveniently may be, after my decease, deliver over the specific things, to the enjoyment whereof I am entitled for my life, under the said will of my mother, to the person or persons, who, for the time being, shall be then entitled to receive the same, upon such of the trusts therein contained or referred to as shall be then subsisting, or capable of being performed, and deliver over such plate, furniture, pictures, rings, watches, and books, as my said late father died possessed of, and that have come to my hands, the books being mentioned in a catalogue made by him, and the plate being distinguished by the armorial bearings of his and my late mother's family, or one of their families; and pay over, to the person or persons entitled to receive the same under my said father's will, the said sum of ———/ (which is stated in my said account as executor to be the amount of the balance owing from me, as such, in respect of the clear residue of my said father's personal estate,) to be laid out in the purchase of lands, as aforesaid, or such other balance or sum of money as may be found due on the taking of such account. And whereas it will appear from my said account, as executor, that some articles of my said late father's furniture were sold by me, which produced the sum of ———/., I direct my executors to make good the same to the said trust estate, either by the delivery of furniture of mine of the like value, or by payment of that sum, to the person or persons entitled for the time being to receive the same under my said father's will. And inasmuch as I have in my hands, as executor as aforesaid, the sum of 26/ for which I have taken credit in my said account as a debt due from my said late father's estate to or in trust for ——— charity, the interest whereof has been for many years past applied for the charitable purpose hereinafter mentioned, I therefore direct my executors to discharge that debt by payment of the said sum of 26/ to such persons, to be approved by the rector, for the time being, of the parish-church of G. aforesaid, as they shall think fit, upon trust to place the same out at interest on government or real securities, with liberty of transposing the same, and to pay the interest or dividends arising therefrom, to the master, for the time being, of the endowed school at G. aforesaid, for educating eleven poor boys in the said school to be nominated from time to time by such rector,



or in his absence from the said cure, by the officiating minister, for the time being, of the said church. And I give unto my said wife an annuity or yearly sum of 10*l.* of lawful money of Great Britain, during her natural life, in addition to her provision under my said marriage settlement and the trusts of the term of 500 years created by my said father's will, the same to be paid clear of taxes and without deductions, by equal half yearly payments, the first payment thereof to be made at the expiration of six calendar months next after my decease. And I give to my said wife absolutely (1) such of my household furniture and linen (2) as she shall select, not exceeding, in the whole, the value of ——*l.* (such value to be ascertained by the general appraisement which I desire to be made of my furniture) except locks, iron ovens, bells fixed, fixed stoves, and such other things as are or may be fixed or fastened to the mansion house at G. wherein I now reside, my will being that such excepted articles shall go along with the said mansion-house, and be enjoyed by the person or persons for the time being entitled to the possession thereof, as heir-looms, so long as the law will permit. And I give to her my said wife the use and enjoyment of such plate as I have purchased, and whereon are engraven the armorial bearings of her or my family, or one of our families, during her life. And from and immediately after her decease I give the same to George N., second son of the said William N., if he shall be then living, absolutely; and if he shall be then dead, unto Peter N., third son of the said William N., if he shall then be living, absolutely: but if neither of them the said George N. or Peter N. shall be then

Additional annuity to testator's wife.

Furniture to his wife absolutely.

Except articles fixed or fastened to the house; which are to go with the house, and be enjoyed as heir looms.

The plate, whereon there are armorial bearings; to the wife for her use, during her life, and after her decease, to two persons named in succession, and if neither should be living at testator's decease to go together with the personal estate.

(1) Where a testator gives to A. during her natural life his house at B. with all the goods that shall be found therein at the time of his decease, the word *with* so conjoins the devise of the house and household goods, that the devisee can have no longer interest in the latter than was expressly limited in the former. 1 Atkins, 470, *Luke v. Bennet*. And where a testator gave to his wife all his household goods, furniture, plate, linen and china in his house at E. or to the house belonging, and also the said house, gardens, &c. so long as she continued his widow, and no longer; Lord Hardwicke held that the household goods, furniture, &c. were put under the same restrictions as the house itself. *Richards v. Baker*, 2 Atk. 321. Such a gift will not bar the wife of her paraphernalia. 2 Atk. 216. See also 3 Atk. 369 and 393.

(2) A bequest of the best of my linen, or of some of my best linen, is void for uncertainty: but a bequest of such of my linen as my executor shall think fit, or as I. S. (the legatee) shall choose, is good, *Peck v. Halsey*, 2 P. Wms. 387.

His wife to sign  
an inventory.

Legacies and  
mourning.

Remuneration  
to executors.

Charity lega-  
cies.

For educating  
four poor boys

To a hospital.

A sum to be  
distributed as  
alms.

The residue of  
the personal  
estate to be  
placed out at  
interest, with  
power to trust-  
tees to vary  
and transpose  
securities.

living, then the same to be considered as part of the residue of my personal estate; and my will is that an inventory shall be made of such plate, and that my said wife shall, on receiving the same, be required to sign such inventory, accompanied with an undertaking for the delivery thereof by her representatives, upon or immediately after her decease, to the person or persons who shall be entitled to the same under this my will. I give to S. P. the sum of 100*l.*, and to R. S. the like sum of 100*l.*; and I desire that each of them may have decent mourning, at the discretion of my executors. I give to my executors the sum of 100*l.* a-piece, as an acknowledgment for the trouble that they may have in the execution of this my will. I give to the said James N. the sum of 30*l.* upon trust, to place out the same on government or real securities at interest, in the name of such persons as he, his executors or administrators, shall think proper, with liberty to the trustees or trustee thereof for the time being of transposing the same, to the intent that such trustees or trustee do apply the interest or dividends arising therefrom for or towards the education of four poor boys, at or in the said school at G. aforesaid, to be from time to time nominated by such trustees or trustee for the time being. I give the sum of 100*l.* to the treasurer for the time being of the infirmary of —, in the county of —, to be applied to the charitable purposes of that institution; and I direct my executors to distribute the sum of — *l.* among such poor persons attending divine service in the parish church of G. aforesaid the Sunday next after my death, and in such proportions as they my said executors shall think proper; and I desire that all my servants who shall be in my service at the time of my decease may receive a whole year's wages, to be added to the sum or sums then due to them for wages. (3) And as to the residue of my personal estate, not otherwise disposed of by this my will, I give the same to my said executors, upon trust that they, or the survivor of them, or the executors or administrators of such survivor, do and shall place out the

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\* The effect of a direction for an inventory is held of itself to limit the enjoyment to the life only of the legatee, *Southey v. Lord Somerville*, 13 Ves. J. 493. And a devisee for life must sign an inventory to be deposited with the master, for the benefit of all parties. *Leeke v. Bennet*, 1 Atkins, 471. *Bill v. Kynaston*, 2 Atk. 81.

(3) Under a general bequest to servants a coachman, provided with a carriage and horses let by the job, is not entitled. *Chilcot v. Bromley*, 12 Ves. J. 114.

same at interest in some of the parliamentary stocks or funds of Great Britain, or on real securities in England at interest, and do and shall from time to time vary, alter, or transpose the same for other stocks or funds, or securities of the like nature, when and so often as it shall seem expedient; and do and shall, after paying and keeping down the said annuity of 10%. hereinbefore given to my said wife for her life, and also the said annuity which I am liable to pay to the said Mary R. during her life, in the mean time, until the capital in the respective shares thereof shall become payable or transferable as hereinafter is mentioned, invest the interest or dividends thereof, as and when the same shall amount to 100%. in like stocks, funds, or securities, so as to cause the same to accumulate in the nature of compound interest; and do and shall pay or transfer one third part of all such stocks, funds, and securities, but subject and without prejudice to the payment of the said annuities unto the said George N. as and when he shall attain the age of 21 years; one other third part thereof unto the said Peter N. as and when he shall attain the age of 21 years; and the remaining third part unto Maria N. daughter of the said William N. as and when she shall attain her age of 21 years; and in case any one or more of them the said George N., Peter N., and Maria N., shall die without having attained the said age, then the share or shares of him or them so dying, of and in the said stocks, funds or securities, shall go and be paid or transferred, subject and without prejudice as aforesaid, to the survivors or survivor, or others or other of them, as and when their respective original shares shall respectively become payable or transferable as aforesaid; and in case any other of them shall die without having attained the said age, then all and every the accruing share or shares shall be subject and liable to the like contingency of accruer or survivorship as is hereinbefore declared, touching his, her, or their respective original share or shares; and in case all of them the said George N., Peter N., and Maria N., shall die without any of them having attained the age of 21 years, then my will is that the whole of such stocks, funds, or securities, shall be transferred, but subject and without prejudice as aforesaid, to — : And I appoint the said — executors of this my last will and testament. And as to my messuage, farm, and lands, situate at or near W. aforesaid, I give the same unto S. P. and R. S., their heirs and assigns for ever; and as to my messuages, farm, and lands, situate in or near to the said settled estate of my family at G. aforesaid, which I purchased of William S.

And after keeping down the annuities, to reinvest the dividends for the purpose of accumulation until the principal shall be payable, as after-mentioned.

One third to be paid to —, one other third to —, and the remaining third to —, at 21, with chance of survivorship.

And if neither of the three should live to become entitled, to be transferred to —.

Devise of his own messuages and farms not under settlement.

To trustees.

Upon trust to  
sell or dispose  
thereof.

Their receipts  
to be dis-  
charged.

And as to mo-  
ney produced  
by the sales;

for the sum of 1900*l.* my messuage, farm, and lands situate at or near to the said estate at B. aforesaid, which I purchased of James P., my lands in ———, contiguous to the said estate at B., and intermixed therewith, which I purchased of John G., my lands in ———, lying also contiguous to the said estate at B., which I purchased of Hugh H., which several premises so purchased by me are partly freehold, and partly leasehold; and also as to for and concerning my messuage, farm, and lands, situate at B. in the said county, and all the rest of my freehold and leasehold estates whereof I have power to dispose in possession, reversion, remainder, or expectancy, and not hereinbefore disposed of, (4) I give the same unto and to the use of the said ——— and ———, their heirs, executors, administrators, and assigns, upon the trusts hereinafter expressed and declared of and concerning the same, that is to say, upon trust, that they and the survivor of them, and the heirs, executors, administrators and assigns of such survivor, do and shall, as soon after my decease as they or he shall think fit, make sale and dispose of all and every my said freehold and leasehold estates, so devised to them as aforesaid, either together or in parcels, by public auction or private contract, as to them or him shall seem meet, for the most money that can be reasonably had or gotten for the same; and I do hereby declare that the receipt and receipts of the said, &c. and the survivor of them, the heirs, executors, administrators, or assigns of such survivor, under their or his hands or hand respectively, shall from time to time be a good and effectual discharge, or good and effectual discharges, to the purchaser or purchasers of the same freehold and leasehold estate, or any part thereof, and his, her, or their heirs, executors, administrators and assigns, for his, her, or their purchase-money, or so much thereof as in such receipt or receipts shall be expressed to be received, and that such purchaser or purchasers, his, her, or their executors, administrators or assigns, shall not be answerable or accountable for any loss, misapplication, or non-application of such purchase-money, so expressed to be received; and as to the money arising from such sale or sales as aforesaid, (as to which I direct a separate account to be

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(4) If a testator, in terms, excepts out of his residuary devise what he has before disposed of, such exception takes out of the residuary devise only the interest before given, not the things themselves; therefore, if a life-estate only in any subject has before been given, the residuary devise comprehends and carries the remaining interest. See 3 Atk. 286.

kept,) my will is, that the same shall be in the first place applied in making good the deficiency, if any shall then be, of my personal estate, not specifically bequeathed, in paying my debts, funeral, and testamentary charges and legacies, (save those for charitable purposes) and that the residue of such monies, or the whole thereof, if there shall be no such deficiency, shall be paid to such person or persons, and be applied for such intents and purposes, as the residue of my personal estate is hereinbefore directed to be paid and applied; and as to the rents, issues and profits of the said estates, until sale thereof, I will that the same shall be paid and applied in such manner as the interest of the money arising by sale thereof would be payable or applicable to under this my will, in case such sale had taken place. Provided always, and it is my will, that in case the trustees or trustee for the time being of the residue of my said father's personal estate shall be willing to accept a conveyance and assignment of my freehold and leasehold estates, in B —, aforesaid, or any of them, or any part thereof at the above-mentioned sum or sums of money, for which I purchased the same, then and in such case it shall be lawful for the trustees or trustee for the time being, under this my will, to make such conveyance and assignment accordingly, on obtaining a sufficient discharge for so much of the said balance on account of the said residuary estate in my hands, as the consideration money of the estate or estates comprised in such conveyance or assignment shall amount to. Provided always, and my will is, that it shall and may be lawful to and for the said, &c. and the survivor of them, and the heirs, executors, administrators, and assigns of such survivor, from time to time, by indenture or indentures under their or his hands and seals, or hand and seal, to demise or lease the said freehold and leasehold hereditaments and premises, so vested in them as aforesaid, or such of them as shall be remaining unsold or undisposed of, during the minority of the said I. P. and R. S., or either of them, unto any person or persons, for any term or number of years not exceeding 21 years, in possession, not in reversion, or by way of future interest, so as upon every such lease there be reserved and made payable, during the continuance thereof respectively, the best and most improved yearly rent or rents that can be reasonably had for the same, to be incident to the reversion of the premises so to be demised, without taking any sum or sums of money, or other thing by way of fine or premium for the making of any such lease, and so as none of such lessees shall be made dispunish-

in the first place to be applied in aid of the personal estate, in paying debts, charges and legacies: and subject to such application in the first place, to be considered as personal, and to go according to the disposition of the residue of his personal estate.

Proviso, that if his late father's trustees should be willing to accept a conveyance of his estate at B —, at the sum at which the same was purchased by testator, it should be lawful for testator's trustees to make such conveyance, taking a discharge for so much of the balance of his father's residuary estate in his hands as the purchase money for such estate should amount to.

Leasing power to trustees.

able for waste, and that in every such lease there be contained a clause of re-entry for non-payment of the rent or rents, to be thereby respectively reserved; and that such lessees seal and deliver counterparts of such lease and leases. Provided, and my will further is, [proviso for substituting new trustees with safety and indemnity clauses.]

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No. 5. -

*Part of a Will directing a settlement with Limitations in a strict Form for preserving the Estate in the Family of the Testator.*

Testator devises his real estates to the use of two sets of trustees successively for two several terms of 99 and 200 years.

**I GIVE** and devise all and singular my freehold manors, messuages, lands, tenements, and hereditaments, wheresoever and whatsoever, not hereinbefore devised, unto the said J. W. and Sir R. J. B., their heirs and assigns, to hold the same to the uses following, that is to say, as to for and concerning all such of the same hereditaments and premises, as are situate in the parish, township, or precinct of N—, in the county of N. with their appurtenances, to the use of the said Sir G. C., R. M., and J. D., their executors and administrators, for and during and unto the full end and term of 99 years, to commence and be computed from the time of my decease, without impeachment of waste, upon the trusts, and to and for the intents and purposes, and with under and subject to the powers, provisos and declarations hereinafter declared or expressed with respect thereto: and as to for and concerning all such of the same hereditaments and premises as are situate in the parishes, townships, or precincts of F. H. and S., and the parishes or townships contiguous and next adjoining thereto, with the appurtenances, except the manor or lordship of F—, and the advowson of the rectory of F—, to the use of the said Sir G. C., R. M., and J. D., J. C. J., and J. F., their executors and administrators, for and during and unto the full end and term of 200 years, to commence and be computed from the



time of my decease, without impeachment of waste, upon the several trusts, and to and for the several intents and purposes, and with under and subject to the several powers, provisos, restrictions, and declarations hereinafter expressed with respect thereto; and as to for and concerning as well all and singular the said hereditaments and premises comprised in the said several terms of 99 years and 200 years respectively, from and after the end, expiration, or other sooner determination of the said terms respectively, and in the mean time subject thereto respectively, as also all and singular other the hereditaments lastly hereinbefore by me devised, from and immediately after my decease, to the uses of the said J. W. J., and Sir R. J. B., their heirs and assigns for ever, upon the trusts, nevertheless hereinafter mentioned, that is to say, upon trust that they the said J. W., Sir R. J. B., or the survivor of them, or the heirs of such survivor, shall, with all convenient speed after my decease, convey and assure all and singular the said manors, messuages, farms, lands, tenements and hereditaments, subject as to such of the said hereditaments as are comprised in the said several terms of 99 years and 200 years respectively, to the same terms respectively, and the trusts thereof, to and for the uses, intents, and purposes, upon the trusts, and with under and subject to the powers, provisos, conditions, restrictions, and limitations hereinafter expressed concerning the same, that is to say, to the use of my said son W. A., and his assigns, for and during the term of his natural life (1), without impeachment of waste, so far as is

And after the determination of the terms, to trustees and their heirs to convey in strict settlement to his son and his issue.

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(1) Where the object of the testator is to preserve the devised estates as long as possible in his family, he may devise the fee to trustees and their heirs to the following uses, *viz.* to the use of his eldest son, for the term of 99 years, to be computed from the day of his the testator's decease, and fully to be complete and ended, if his said son shall so long live, and from and immediately after the determination of the said term, and in the mean time subject thereto, to the use of the trustees and their heirs, during the life of the said son, in trust, in the usual form, to preserve the contingent remainders, and from and after the decease of the said son, to the use of the first and other sons of that son in tail male, to be followed with like limitations successively, in favour of the younger sons of the testator, and their first and other sons respectively, remainder to testator's eldest daughter, for a similar term, if she should so long live, remainder to trustees to preserve contingent uses, and so on, with like limitations successively in favour of the testator's younger daughters, with remainder to their first and other sons respectively, in tail male, in the same manner with successive remainders, if testator please, to daughters of sons, and then



consistent with the trusts of the same several terms of 99 years, and 200 years respectively, while the same shall be respectively subsisting, and from and after the determination of that estate, by forfeiture or otherwise, in the life-time of the said W. A., to the use of trustees in such settlement, to be named, and their heirs, during the life of the said W. A., in trust by the usual ways and means to support and preserve the contingent uses and estates thereby limited, but nevertheless to permit and suffer the said W. A., and his assignees, during his life to receive and take the rents, issues, and profits thereof, for his and their own benefit; and from and after the decease of the said W. A., to the use of the 1st, 2d, 3d, 4th, and all and every other son and sons of the body of the said W. A., lawfully begotten, or to be begotten, severally, successively, and respectively, and in remainder, one after another as they respectively shall be in seniority of age and priority of birth, and the several respective heirs male of the body and respective bodies of such son and sons, lawfully issuing, so as that every elder of such sons, and the heirs male of his body issuing, shall be always preferred to and take before the younger of such sons, and the heirs male of his and their body and bodies issuing, and for default of such issue, to the use of my said younger son Edward, for and during the term of his natural life, without impeachment of waste, so far as is consistent with the trusts of the same several terms of 99 years and 200 years respectively, whilst the same shall be respectively subsisting; and from and after the determination of that estate, by forfeiture or otherwise, in the life-time of my said son Edward, to the use of such trustees in such settlement to be named, and their heirs, during the life of my said son Edward, in trust, by the usual ways and means to preserve and support the contingent uses and estates thereby to be limited, but nevertheless to permit and suffer my said son Edward, and his assigns, during his life, to receive and take the rents, issues, and profits thereof, for his and their own use and benefit, and from

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to daughters of daughters, as tenants in common in tail, with cross remainders.

The consequence of thus giving to the children of the testator terms of years determinable with their lives, instead of estates of freehold, will be, that they will not be able with the concurrence of the tenant in tail in remainder, unless the trustees will join in making a tenant to the præcipe, to suffer a recovery so as to defeat the remainders after such tenant in tail: the tenant in tail can, in such a case, only bar his own issue by a fine.

and after the decease of my said son Edward, to the use of all and every other the 1st, 2d, 3d, and 4th son and sons of the body of my said son Edward, lawfully begotten, severally, successively, and respectively, and in remainder, one after another as they respectively shall be in priority of birth and seniority of age, and the several and respective heirs male of the body and respective bodies of such son and sons, lawfully issuing, so as that the elder of such sons, and the heirs male of his body issuing, shall always be preferred to and take before the younger of such sons, and the heirs male of his and their body and bodies issuing; and for default of such issue, to the use of all and every other the son and sons of my body, lawfully begotten, or to be begotten, severally, successively, and respectively, and in remainder, one after another as they respectively shall be in seniority of age, and priority of birth, and the heirs male of the body and respective bodies of such son and sons lawfully issuing, so as that the elder of such sons and the heirs male of his body shall be always preferred to and take before the younger of such sons, and the heirs male of his and their body and respective bodies issuing; and for default of such issue, to the use of trustees and their heirs, during the lives of my said daughters L. and C., and the life of the survivor of them, in trust to pay the rents, issues, and profits thereof to such person or persons respectively as they my said daughters respectively, during their joint lives, by any writing or writings under their respective hands, shall from time to time as the same respectively shall become due or payable, but not by way of anticipation, direct or appoint, so as that my said daughters, during their joint lives, shall not have a power of disposing of more than a moiety each of the said rents, issues, and profits, and for want of such direction or appointment, into the proper hands of them respectively in moieties, whilst both of them shall be living, for their respective, sole, and separate use, exclusively and independently of any husband or husbands, and not in anywise to be subject to the controul, debts, or engagements of their respective husbands; and from and immediately after the decease of either of my said daughters who shall first happen to die, then in case such daughter so dying shall leave any child or children her surviving, in trust during the natural life of the survivor of my said daughters, to pay and apply one moiety or equal half part of the rents, issues, and profits of the said premises unto, and amongst, or for the benefit and advantage of such child or children, in equal shares and proportions, if more

For default of issue of sons, to trustees during the lives of his two daughters, and the survivor of them, for their separate use respectively, with limitations to their respective issue in tail, but such limitations of the inheritance not to take place till both the daughters shall be dead, to prevent alienation till that event, and then the distinct moieties to go in succession to the sons of testator's said daughters in tail male; and for default of such issue respectively, then to the first and other sons of the other daughter reciprocally.

than one, and if there shall be only one such child, then for the benefit and advantage of such one child ; and to pay and apply the other moiety of the said rents, issues, and profits to such person or persons as such surviving daughter, by any writing or writings under her hand, shall from time to time as the same shall become due or payable, but not by way of anticipation, direct or appoint, and for want of such direction or appointment, into the proper hands of such surviving daughter, for her sole and separate use exclusively and independently of any husband, and not to be in any wise subject to the controul, debts, or engagements of any husband ; but in case such daughter so first dying as aforesaid shall not leave any child or children her surviving, or leaving any such, all of them shall happen to die during the life of such surviving daughter, then upon trust, from and immediately after such failure of children of such daughter so first dying as aforesaid, as the case may happen, in trust, to pay and apply the whole of the said rents, issues, and profits to such person or persons as such surviving daughter, by any writing or writings under her hand, shall from time to time, during her life, as the same shall become due or payable, but not by way of anticipation, direct or appoint ; and for want of such direction or appointment into the proper hands of such surviving daughter ; for her sole and separate use exclusively and independently of any husband, and not to be in anywise subject to the controul, debts, or engagements of any husband ; and my will is that the respective receipts in writing of my said daughters, and the receipt of the survivor, notwithstanding any coverture, or the receipt or receipts of the person or persons to whom they respectively, or the survivor of them, shall direct the said rents, issues, and profits to be paid as aforesaid, shall be good and effectual releases and discharges for the rents, issues, and profits therein mentioned to be received ; and upon further trust, during the lives of my said daughters, and the life of the survivor of them, to preserve the contingent uses and estates, to be limited as hereinafter mentioned ; and from and after the decease of the survivor of them my said daughters as to one moiety or equal half part or share of the same hereditaments, to the use of the first and other sons of my said daughter L. successively, according to their respective seniorities in tail male, and for default of such issue, to the use of the first and other sons of my said daughter C. successively, according to their respective seniorities in tail male ; and as to the other undivided moiety or equal half part or share of the same hereditaments, to the use of the first and other sons of my said

And after the decease of both daughters, and failure of issue of both their bodies, then as to the entirety of the premises, to

daughter C. successively, according to their respective seniorities in tail male, and for default of such issue, to the use of the first and other sons of my said daughter L. successively, according to their respective seniorities in tail male; and from and after the decease of both my said daughters, and failure of issue male of both their bodies as aforesaid, then as to the entirety of the same hereditaments, to the use of all and every the daughter and daughters of my said son W. A. if more than one as tenants in common in tail, with cross remainders in tail between or among them; and if all his daughters but one shall die without issue, or he shall have but one daughter, to the use of such one or only daughter in tail; and for default of such issue, to the use of all and every the daughters and daughter of my said son Edward, if more than one, as tenants in common in tail, with cross remainders in tail, between and among them: and if all his daughters but one shall die without issue, or he shall have but one daughter, to the use of such one or only daughter in tail: and for default of such issue, then as to one undivided moiety or equal half part or share of the same hereditaments, to the use of all and every the daughter and daughters of my said daughter L. if more than one, as tenants in common in tail, with cross remainders in tail, between or among them; and if all her daughters but one shall die without issue, or she shall have but one daughter, to the use of such one or only daughter in tail; and for default of such issue, to the use of all and every the daughter and daughters of my said daughter C. if more than one, as tenants in common in tail, with cross remainders in tail, between or among them; and if all her daughters but one shall die without issue, or she shall have but one daughter, to the use of such one or only daughter in tail: and as to the other undivided moiety or equal half part or share of the same hereditaments, to the use of all and every the daughter and daughters of my said daughter C. if more than one, as tenants in common in tail, with cross-remainders in tail between or among them; and if all her daughters but one shall die without issue, or she shall have but one daughter, to the use of such one, or only daughter, in tail: and for default of such issue, to the use of all and every the daughters and daughter of my said daughter L. if more than one, as tenants in common in tail, with cross remainders in tail, between or among them; and if all her daughters but one shall die without issue, or she shall have but one daughter, to the use of such one or only daughter in tail: and from and after the decease of both of my said daughters, and such failure of issue of both

the daughters of testator's eldest son as tenants in common in tail, with cross remainders; and for default of such issue to the daughters of his second son in like manner; and for default of such issue then as to one moiety to the use of the daughter of testator's eldest daughter, as tenant in common in tail, with cross remainders. And in default of such issue to the daughters of his youngest daughter, in like manner.

And as to the other moiety to the use of the daughters of the youngest daughter, in like manner.

And in default of such issue to the daughters of the eldest daughter in like manner.

And after the decease of both daughters, and failure of such last mentioned issue of both their bodies, to the use of testator's own right heirs.

Clause binding the testator's descendants and possessors of his property, to take the name and use the arms of his family.\*

their bodies as aforesaid, then as to the entirety of the same hereditaments, to the use of my own right heirs. Provided always, and I do hereby declare my will and mind to be, that in the settlement so to be made as aforesaid shall be contained a proviso, that all and every the person and persons, who, by virtue of the limitations to be therein contained, or of this proviso, shall become entitled to the possession, or to the rents, issues, and profits of the manors, and other hereditaments in such settlement to be comprised, and who shall not then be called by the name, or use the arms of H., except as hereinafter excepted, or otherwise provided, do and shall within the space of one year next, after they respectively shall become entitled to the possession, or to the rents and profits thereof: and also, that all and every the person or persons, whom the said L., or any issue female of my said sons or daughters respectively shall marry, shall and do, if the said L. or such other issue female respectively, as aforesaid, shall, at the time of such her or their marriage or respective marriages, be so entitled as aforesaid, then within one year next, after the solemnization of the said marriage or marriages, respectively; and if the said L. or such other issue female respectively as aforesaid, shall not be entitled at the time of such her or their marriage, or respective marriages, but shall afterwards, during her or their marriage, or respective marriages, become so entitled as aforesaid, then within the space of one year next after she or they shall severally become entitled as aforesaid, take upon himself, herself, and themselves, and use in all deeds and writings, whereto or wherein he she or they shall be a party or parties, and upon all other occasions, the surname of H. only, and no other surname: and also shall and do quarter the arms of H. with his her or their own family arms; and shall and do within the space of one year, apply for, and endeavour to obtain an act of parliament, or proper licence from the crown, or take such other means as may be requisite and proper, to enable and authorize him her or them respectively to take, use, and bear the surname and arms of H.; and that in case any such per-

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\* It seems pretty well settled that this is not a condition precedent to the vesting; and therefore a tenant in tail may suffer a recovery without troubling himself to take the name, if he objects to it. Upon this question being put to the late Mr. Fearn, however, though he thought it not absolutely necessary, yet he said he would advise it to be done on the party's coming of age, before suffering the recovery, and the recovery to be suffered in the name directed to be assumed, to prevent all questions on the point. See the case of *Gulliver v. Ashby*, 4 Burr. 19291. Blackst. 607.

son or persons shall refuse or neglect, or discontinue to take and use, such surname and arms, and to take such proper steps and means as maybe requisite to enable and authorize him her or them so to do, within the space of one year as aforesaid, then from and after the expiration of the said space of one year, the use or estate, or uses or estates, so to be limited to him, her, or them, respectively, so neglecting or refusing, shall cease, determine, and become utterly void, and that all the said manors, and other hereditaments, hereinbefore directed to be conveyed and settled as aforesaid, shall in such case, immediately thereupon, go to the person or persons next in remainder, under the limitations in such settlement to be contained, in the same manner as if such person or persons, so neglecting or refusing, being tenant or tenants for life, were dead, or being tenant or tenants in tail male, or in tail, were dead without issue inheritable under the estate tail, or estates tail, then vested in possession, or in remainder, in the person or persons so refusing or neglecting : provided always, and I do hereby expressly declare my will and mind to be, that the clause hereinbefore contained for compelling the persons hereinbefore mentioned, to use the name and arms of H. shall not extend to any person or persons, who shall, under any will or other instrument whatsoever, made prior to the 1st day of January, ———, be under any previous obligation of using any other family name, or bearing any other family arms. And I do hereby declare my will to be, that in such settlement shall be contained a power to enable the person or persons, who, for the time being, shall, by virtue of the limitations in such settlement to be contained, be entitled to the said manors and hereditaments hereinbefore directed to be conveyed and settled as aforesaid, for an estate of freehold, to grant, demise, limit, or appoint all and singular the said hereditaments, or any of them, or any part thereof, for any term or number of years, not exceeding 21 years, at the most improved rent, without taking any fine, and under the usual restrictions ; so nevertheless that no such lease of all or any part of the hereditaments, comprised in the said term of 200 years, be made to commence prior to the 29th day of September, which will be in the year of our Lord ———. And I do hereby also direct, that in such settlement, so to be made as aforesaid, there be contained a power, enabling the said Sir G. C., R. M., J. D., J. C. J., and J. F., and the survivors and survivor of them, and the executors and administrators of such survivor, from time to time, to demise or lease all and singular the hereditaments comprised in the said term of 200

Settlement to contain a power of leasing.



Also a power to enable the trustees to sell or exchange.

And to purchase, with the money arising from such sale, other lands, and to settle the newly purchased lands, or such as are taken in exchange, to like uses.\*

years, or any of them, or any part or parts thereof, for any term or number of years in possession, determinable on or before the said 29th day of September, which will be in the said year of our Lord, at the most improved rents, without taking any fine, and under the same restrictions; and also a power to enable the said Sir G. C., R. M., J. D., J. C. J., and J. F., and the survivors and survivor of them, and the executors and administrators of such survivor, from time to time, and at any time or times hereafter, at the request and by the direction of the person or persons who, for the time being, shall be entitled to the hereditaments, to be comprised in the settlement hereby directed to be made as aforesaid, for an estate of freehold, either in possession, or in remainder, immediately expectant upon the said several terms of 99 years and 200 years respectively, signified by some writing under the hand and seal, or hands and seals of such person or persons, attested by two or more credible witnesses, to make sale of, or to convey in exchange for, or in lieu of other hereditaments, all or any of the hereditaments to be comprised in the settlement so to be made as aforesaid, the fee simple and inheritance thereof, as well as for the said terms of 99 years and 200 years respectively, due regard being had to the proviso next hereinafter contained or expressed, with the usual clauses, making the receipts of the said Sir G. C., R. M., J. D., J. C. J., J. F., or the survivors or survivor of them, or the executors or administrators of such survivor, effectual discharges to the purchaser or purchasers of the hereditaments which shall be so sold, and the usual directions to lay out the money to arise by such sale or sales, in the purchase of other freehold lands of inheritance, or

Where the estate directed to be purchased cannot be had, other lands may be bought.

\* Where a will, directing money to be laid out in land, points to a particular estate, if that fails, it may be laid out in other lands, the particular direction being only a mode of executing the primary intention to purchase lands, 10 Ves. Jun. 618. This has been decidedly holden by the present Lord Chancellor, though Lord Thurlow used to differ with Lord Rosslyn on this question, the latter lord being of the opinion to which Lord Eldon has since added the weight of his authority.

Where the place, and not the estate is specified.

Whether money directed to be laid out in land, in a particular place, shall, if land cannot be procured there, be laid out elsewhere, has been left undecided by the present chancellor. Lord Rosslyn was of opinion it might, Lord Thurlow that it could not, see 10 Ves. Jun. 610. But as Lord Eldon held the affirmative on the other question, when it came before him a short time afterwards, a conjecture may be allowed as to the probable result, if his Lordship were now called upon to settle the point where the place, and not the estate, was particularized. See *Maynwaring v. Maynwaring*, 3 Atk. 414. *Oldham v. Hughes*, 3 Atk. 458.



of copyhold lands, convenient to be held with the lands to be comprised in such settlements as aforesaid, or any of them, or so to be purchased or taken in exchange, in pursuance of this my will, and to settle the lands so to be purchased, or so to be received in exchange as aforesaid, to such uses as the hereditaments, which shall be so sold or conveyed in exchange, stood settled, and limited respectively, immediately before such sale or exchange, or as near thereto as the nature of the tenure and circumstances will permit, any thing hereinbefore contained to the contrary thereof in any wise notwithstanding. Provided always, and I do hereby declare my will to be, that no manors, messuages, lands, tenements, or hereditaments, situate, lying, and being, in the parishes of —, and —, respectively, or any of them, shall be sold, aliened, or disposed of, except in exchange for, or in lieu of, hereditaments in the parishes of A. and B. in the said county of N. respectively, or one of them, and two pieces of osier ground, or meadow, lying in the last mentioned parishes, or one of them, or partly there, and partly in some other parish or parishes, abutting east, on a brook or rivulet that runs through the commons of — and —, and is there the boundary of the parish of G. against the said parishes of A. and B. And further, that no sale, alienation, or disposition as last mentioned, shall be made of the alternate right of presentation to the rectory of K. except for the actual exchange of, or for the alternate right of presentation to the rectory of A. in the said county of N. upon such terms as the said Sir G. C., R. M., J. D., J. C. J., and J. F., or the survivors or survivor of them, or the executors or administrators of such survivor, shall judge proper. And my will is, and I do hereby declare, that there shall likewise be inserted in the said settlement all such further and additional clauses, declarations, agreements, powers, and provisos, as the counsel of the said J. W. and Sir R. J. B., or the survivor of them, or the executor or administrator of such survivor, shall advise to be proper or expedient, but conformable to the general spirit and intent of this my will. And I do hereby declare, that the said term of 99 years hereinbefore limited in use to them the said Sir G. C., R. M., and J. D. of and in the hereditaments and premises in N. as aforesaid, is so limited to them, and that they, the said Sir G. C., R. M., and J. D. and the survivors or survivor of them, and the executors and administrators of such survivor shall stand, and be possessed of, and interested in the same, and the hereditaments therein comprised, upon the trusts,

Limitations restricting the exercise of the last-mentioned power as to certain specific objects.

Other clauses to be inserted in the settlement as counsel shall advise, but to be conformable to the spirit of the will.

Trust of the term of 99 years, to raise an annuity for the person named.

and to and for the intents and purposes, and under and subject to the provisos hereinafter declared or expressed, of and concerning the same, that is to say, in trust by mortgage of the hereditaments, comprised in the same term, or a competent part or competent parts thereof, from time to time, and by and out of the rents, issues, and profits thereof, or by any of the said ways and means, or by any other such ways and means as to the said Sir G. C., R. M., and J. D., or the survivors or survivor of them, or the executors or administrators of such survivor, shall seem meet, to levy and raise, by even and equal quarterly payments or portions, one annuity, or clear yearly sum of 400*l.* of lawful money of Great Britain, during the life of my said brother R. H., and for one year after his decease, free from all deductions or abatements whatsoever, and also all such sum and sums of money as shall be sufficient to pay and reimburse to the said trustees respectively, their respective executors and administrators, all costs, charges, losses, damages, and expenses, which they respectively shall or may sustain, expend, or be put unto, in, or about the levying or raising the said annuity, or yearly sum of 400*l.* or any part thereof, or in anywise relating thereto, and from time to time, by and out of the said annuity or yearly sum of 400*l.* as the same shall be received, in the first place to make such allowances to my said brother R. H. as are now usually made to him, and to defray and pay the other charges and expenses now usually incurred for his maintenance, together with such further additional sums as the said Sir G. C., R. M., and J. D., or the survivors or survivor of them, or the executors or administrators of such survivor, may deem requisite or proper, for his additional comfort or convenience, and also all expenses attending the funeral of my said brother, and all such just debts as may be owing by him, or on his account, at the time of his death, and from time to time to pay the residue of the said annuity or yearly sum of 400*l.*, after answering all and every the purposes aforesaid, to the person or persons who shall, for the time being, be entitled to an immediate estate of freehold, of and in the hereditaments comprised in the said term of 99 years, expectant on the same term, or to the receipt of the rents, issues, and profits thereof, for his her or their own absolute use and benefit. Provided always, and I do hereby declare my will to be, that from and after the trusts and purposes by this my will declared or expressed, of or concerning the said term of 99 years, shall be fully performed and

satisfied, or shall become unnecessary or incapable of being performed, or be otherwise discharged, the said term of 99 years, of and in the said hereditaments comprised therein, or so much thereof as shall not have been mortgaged for the purposes aforesaid, shall cease, determine, and be absolutely void to all intents and purposes whatsoever. And I do hereby declare, that the said term of 200 years hereinbefore limited in use to them the said Sir G. C., R. M., J. D., J. C. J., and J. F., their executors and administrators as aforesaid, is so limited to them, and that they the said Sir G. C., R. M., J. D., J. C. J., and J. F., their executors and administrators, shall stand possessed of, and interested therein, upon the several trusts, and to and for the several intents and purposes, and with, under, and subject to the several powers, provisos, restrictions, and declarations following, that is to say, upon trust, that they, the said Sir G. C., R. M., J. D., J. C. J., and J. F., and the survivors and survivor of them, and the executors and administrators of such survivor, shall and do, by mortgage or sale of the hereditaments, and real estate, comprised in the said term, or a competent part, or competent parts thereof, from time to time, and by and out of the rents, issues, and profits thereof, or by cutting down timber, or other trees, so nevertheless that no timber or other trees be cut down without the consent in writing of the person or persons, for the time being, entitled to the next immediate estate of freehold of and in the said hereditaments comprised in the said term of 200 years expectant on the said term, or by all or any of the said ways and means or by any other such ways and means as to the said Sir G. C., R. M., J. D., J. C. J., and J. F., or the survivors or survivor of them, or the executors or administrators of such survivor, shall seem meet, levy and raise such sum and sums of money as shall be sufficient to pay, and shall and do accordingly pay, after my personal estate not hereby specifically bequeathed shall be applied so far as the same shall extend, my funeral expenses, and the expenses of proving this my will, and the pecuniary legacies, (except the additional portions) and the annual sums for my younger children, hereinafter directed to be raised or paid and given, and all my bond, simple contract, and other debts, and the interest of such debts as carry interest, as the same shall become due, and all arrears thereof, and all the expenses of keeping the said several premises comprised in the said term of 200 years, in good order and repair, and the taxes, assessments, and outgoings in respect thereof payable by the landlord, and the ex-

Proviso for  
cesser of the  
term when the  
trusts shall be  
fulfilled.

Trusts of the  
term of 200  
years to aid the  
personal estate,  
if insufficient, in  
paying the  
debts, charges,  
and legacies,  
and to defray  
the expense of  
keeping the  
premises com-  
prised in the  
term in repair;  
to pay the ex-  
penses of re-  
newals of re-  
newable leases,  
and fines upon  
admittances to  
copyholds; to  
pay the ex-  
pense of pur-  
chasing cot-  
tages and com-  
mon rights,  
and of inclo-  
sure; a salary  
to the receiver  
of the rents of  
the estates  
comprised  
within the first  
term; to pay  
additional por-  
tions, and to  
satisfy such se-  
curities as  
shall have been  
given for the  
same; and to  
raise a sum by  
way of jointure  
for such wo-  
man as testa-  
tor's younger  
son may marry;  
and to lay out  
the residue in  
the funds, to  
accumulate for  
20 years of the  
term as a fund  
subject in the  
first place to  
satisfying the  
aforesaid  
trusts, and  
then to answer  
the aftermen-  
tioned objects.

penses of renewing from time to time the leases of my several leasehold estates hereinafter bequeathed until the whole beneficial interests therein respectively shall vest in any person or persons absolutely, (so nevertheless that no renewal shall be taken of the lease of the manors of S ———, and the lands and tenements hereinafter mentioned to be holden by lease under the crown, without the consent of such person or persons as hereinafter mentioned) and also the expenses of all admittances to copyhold estates under this my will, and the expenses attending the purchase of any cottages, with the appurtenances and commonable rights within the parish of F. aforesaid, which the said Sir G. C., R. M., J. D., J. C. J. and J. F., or the survivors or survivor of them, or the executors or administrators of such survivor, shall judge it expedient to purchase, so as the consideration-money for the whole of such purchases do not exceed the sum of ———£. and so as the hereditaments so to be purchased be settled and assured to such uses, and upon to and for such trusts intents and purposes, and with under and subject to such powers, provisos, limitations, and declarations, as at the respective times of such purchase or purchases being made, shall be subsisting or capable of taking effect as to the hereditaments and premises comprised in the said term of 200 years, under or by virtue of this my will, or of the settlement hereinbefore directed to be made as aforesaid, and also all expenses attending any inclosure of the common of F., and the planting thereof or otherwise improving the same; and the expenses of my trustees and executors in the execution of this my will, and the trusts and powers herein contained, and a proper and sufficient salary or allowance to the person or persons who for the time being shall be employed in managing my estates comprised in the said term of 200 years, and receiving the rents and profits thereof, and keeping books and accounts for my trustees for the time being, of all matters relating to this my will, and the trusts herein contained or expressed: and in the next place levy and raise, and pay such additional portions for my daughter L. and my said son E. as are hereinafter mentioned, when and as the same respectively shall become due and payable, and be called in and demanded, or discharge and satisfy such securities as may have been given for the same, and all mortgages which shall have been made for raising the same, and also such annual sum for or in the nature of a jointure for any woman with whom my said son E. shall happen to marry, as hereinafter is mentioned, and such sum in gross for the benefit

of the younger sons and daughters of my said son E. as hereinafter is mentioned, and all such sum and sums of money as shall be sufficient to answer all and every the payments hereinafter directed to be made out of the money to arise or be received under or by virtue of the trusts of the said term of 200 years; and shall and do accumulate from time to time for and during and unto the full end and term of 20 years, to commence and be computed from the time of my decease, so much of the rents, issues, and profits of the said hereditaments and premises comprised in the said term of 200 years, as shall not be from time to time applied for some or one of the purposes aforesaid, according to the direction aforesaid, and lay out and invest the same from time to time in the names or name of them my said trustees, or the survivors or survivor of them, or the executors or administrators of such survivor, in some of the public funds, and from time to time accumulate the dividends, interests, and proceeds of such funds, or so much thereof as shall not be applied for some or one of the purposes aforesaid, and lay out and invest the same in like manner, and so in like manner accumulate the dividends, interests, and proceeds of such other funds, or so much thereof as shall not be applied as aforesaid, to the intent that in this manner a fund may be established for answering the purposes aforesaid, and also the purposes hereinafter mentioned, out of which fund I direct the same or such of them as shall from time to time remain unsatisfied and be capable of being carried into effect, to be answered and carried into effect. And my will is, and I do hereby direct and appoint that by and out of the said fund so to be established as aforesaid but not otherwise, after the several purposes aforesaid, or such of them as shall be capable of being carried into effect shall be satisfied, the trustees or trustee for the time being of the said term of 200 years, hereby limited or created, shall pay off and discharge all mortgages, securities, and charges which shall have been made of or upon any of my estates in pursuance or by virtue of this my will, besides such mortgages as are hereinbefore directed to be paid, and in the next place shall pay off and discharge so far as the said fund shall extend, such mortgage or mortgages and securities as may then have been made in pursuance or by virtue of or under the said indenture of the — day of ———, or any part or parts thereof, for the purposes of raising all or any of the portions thereby directed to be raised, or any of them, or any part or parts of them, or of any of them; and in case the said last-mentioned portions

Trustees out of the said fund to discharge mortgages upon any of the testator's estates.

Testator gives the leaseholds not before bequeathed to trustees, in the first place, out of the rents and profits, to pay the rents, the expenses of performing the covenants, and of renewals, and subject thereto to stand possessed thereof upon trusts to correspond as nearly as may be with the uses, trusts, &c. before declared and limited of and concerning the

or any part or parts thereof respectively, shall not have been so secured, then in trust to pay off and discharge such of the said portions or such part or parts thereof as shall not have been so secured. And I give and bequeath all my leasehold lands and tenements not hereinbefore bequeathed as aforesaid, nor included in any settlement made by me previous to the making of this my will, unto the said Sir G. C., R. M., J. D., J. C. J., and J. F., their executors and administrators, for all my term and terms, estate and interest therein respectively, in trust in the first place out of the rents and profits thereof, to pay the rents reserved and to be reserved by the respective leases under which the same are or shall be holden, and to perform and pay the expenses of performing the covenants and agreements in such leases respectively contained on the lessee's or tenant's parts, and to pay the taxes payable by the landlord in respect thereof, and to renew and pay the expenses of renewing such leases from time to time, at the accustomed times of renewal, and subject thereto, to stand and be possessed and interested of and in the same respectively, upon such trusts, (2) and to

Of the effect of the clause directing leaseholds to be settled, as far as the law will allow, upon trusts correspondent to the uses of the freehold.

(2) By a limitation of leaseholds or mere personal chattels in strict settlement where the personal estate is either included in the same limitation as the freehold, or limited with reference to such limitations of the freeholds, the first tenant in tail that comes into esse, becomes absolutely entitled to the personal property, subject to the preceding particular estates therein, and this of course frequently produces a separation between the real and personal estate. See *Gregory v. Pelham*, 5 Bro. P. C. 435; and the *Duke of Bridgewater v. Egerton*, 2 Ves. 122; and *Duke of Marlborough v. Spencer*, 5 Bro. P. C. 592. But this vesting may be postponed by specific limitations to a more distant period, and the estate made to accompany still further the freehold estates. The settler may suspend the absolute vesting of the leasehold estates to any period not exceeding 21 years, after a life or lives in being. In reference to these modes of continuing the personal estate in the channel of the real estate, wills and settlements frequently vest the leasehold property in trustees, directing them to settle them according to the limitations of the freehold *as far as the law will allow*, or in terms of similar import. Lord Hardwicke treated these words as affording a ground for a court of equity to model the limitations accordingly; for he thought that this clause was to be considered as executory and directory, and that it was for that Court to direct such conveyance as would make the interests in both species of estates correspond as far as by law was practicable, or in other words, as far as the settler or testator could himself have done; and it was plain he might have limited them to A. for life, remainder to his first son, and the heirs male of his body, and if such first son died before the age of 21, and without issue male, remainder over to his second son; he might have made the same limitations over to all the other sons, and in default of such issue, he might have limited the remain-



and for such intents and purposes, and with under and subject to such powers, provisos, conditions, restrictions, limitations, and declarations, as will best and nearest correspond and

freehold property (except the said terms of 99 and 200

der over; and in case no son had lived to attain the age of 21, the remainder would have been clearly good. It was said by Lord Hardwicke, that that was the common and known way of conveyancing in settling chattels, and that where things were directed to go as heir-looms with an estate, or in case of a marriage settlement, or the like, so far as they could by law or equity, it was very proper it should be left to the court to settle the conveyance. See *Gower v. Grosvenor*, Barnardiston's Rep. in Ch. 54. and *Trafford v. Trafford*, 3 Atk. 347. But other cases have held that these words, "as far as the law will allow," do not necessarily import a desire that the chattels should be kept in the channel of succession as long as the ingenuity of conveyancers might contrive; but that they must be understood as being meant only to direct that estates may be taken in the personal property as nearly correspondent as the law allows, having respect to their different natures. And this was Lord Thurlow's opinion, in *Vaughan v. Burslem*, 3 Bro. C. C. 101. who there held that when the first son came into esse, he was absolutely entitled under such a directory clause; see *Foley v. Barnell*, 1 Bro. C. C. 274. It appears that Lord Eldon had considered the question as settled by the two cases of *Foley v. Barnell*, and *Vaughan v. Burslem*; for in the *Countess of Lincoln v. the Duke of Newcastle*, 12 Ves. Jun. 218. he said that if he had decided that cause originally, he should have decided it according to *Vaughan v. Burslem*, as considering himself bound by that case, and *Foley v. Barnell*, though he would confess he thought Lord Hardwicke's the better doctrine. He acquiesced in the opinion of the other Lords who modified the decree upon the principle laid down by Lord Hardwicke. In the said case of *Lady Lincoln v. the D. of N.* the tenant in tail having arrived at 21 before the cause came on upon the appeal, it was only necessary to determine that the leasehold estate should be assigned absolutely to him, and all the succeeding directions of the decree which had prospectively carried on the limitations upon the plan adverted to by Lord Hardwicke, in *Gower v. Grosvenor*, were left out, so that the decree, as it finally stood, affords no precedent for the form of the limitations to be adopted in order to carry into effect the directory clause above-mentioned. His Lordship said that, according to his opinion, the best principle would be that the testator ought to be considered as furnishing the Court with all the means of enabling the party to tie up the property, not as long as the rules of law would admit, but to that convenient extent which would enable the Court to execute the general primary purpose of the will or settlement to carry together the real and personal estate. And that principle clearly was not executed by the manner in which it was proposed to be done by the decree in that case; for by Lord Hardwicke's method, and the method pursued in the decree, it was not to go over upon the simple contingency of the death under 21, but upon the event of the son's dying under that age and without issue. Now under this form of limitation the son might, upon arriving at the age of 14, bequeath the estate subject to the contingency of his dying under 21, not leaving issue, and supposing he died intestate, under 21 leaving issue, that issue male would not take the lease-



years) but so as not to be considered as vested in equity in any person who would become entitled in equity to the whole interest therein, until such person shall attain 21.

agree with the uses, trusts, powers, provisos, conditions, restrictions, limitations, and declarations hereinbefore limited, declared or expressed, of or concerning the hereditaments hereinbefore devised and directed to be settled as aforesaid, (other than and except the said terms of 99 years, and 200 years hereby limited, and the trusts thereof), but so as such leasehold premises be not considered as an interest vested in equity, in any person who would become entitled in equity to the whole interest therein, until such person shall attain the age of 21 years, yet so nevertheless as not to deprive such person during his her or their minority, of the clear rents, issues, and profits thereof. And my will is, and I do hereby direct, that as soon as may be after my decease, a catalogue of all my books shall be taken, and an inventory made of all my plate, linen, china, pictures, prints, furniture, and household goods at ——— house, such inventory to be made by two or more persons used and accustomed to business of this kind, one of them to be named by my eldest son, and the other or others by the said Sir G. C., R. M., J. D., J. C, J., and J. F.,

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hold as he would the real estate, but the leasehold would be part of his general personal estate, which might go to the next of kin, and equally to the wife with them. And if the going over were made to depend upon the simple contingency of the dying under 21, without regard to issue, then if an infant son died, leaving issue, the real and personal estates would be separated, the real going to such issue in tail, and the leasehold going to the next remainder man. Lord Eldon, however, did not suggest any other mode; and I am not aware of any other or better now in use among conveyancers. The attempt is subject to great danger and difficulty. These rules and observations apply to all personal estates, chattels, and goods where they are directed to go along with and accompany the freehold uses and estates, as far as the law will allow. And where the will directs the trustees, as to certain specific articles, to settle the same so as that they shall go with, and be annexed to the property of the mansion house, and premises, as heir-looms, the principles above considered are equally applicable. But where the will is not directory of a settlement, but limits the chattel to go as an heir loom, it seems the first tenant in tail who comes into esse, will take it absolutely; see the *Duke of Bridgewater v. Egerton*, 2 Ves. 121. 1 Bro. C. C. 380. (n.) *Gower v. Grosvenor*, Barn. Ch. R. 54. *Foley v. Barnell*, 1 Bro. C. C. 274. and *Vaughan v. Burslem*, 3 Bro. C. C. 202. And whether a testator without interposing trustees directs that the chattels shall go as heir-looms with his real estate, or gives the chattels to trustees without words directory of any settlement to be made by them, but simply in trust to permit them to go with the manor-house, or to be enjoyed by such person or persons as shall be, from time to time, under the will entitled to it, for so long time as the rules of law and equity will permit, the consequence will be the same. See the case of *Car v. Lord Errol*, 14 Ves. Jun. 478.

or any two or more of them, and three copies at least of the said catalogue and inventory respectively, shall be made and signed by the persons taking the same respectively, one copy of which said catalogue and inventory respectively shall be delivered to my eldest son, one to my youngest son, and one to the said Sir G. C., R. M., J. D., J. C. J. and J. F., or one of them; such last-mentioned copy of the said catalogue and inventory to be kept and preserved, with the books, papers, and receipts, relating to the trust estate as aforesaid: and I direct that no articles whatever be removed from my said house until such catalogue and inventory shall be taken and signed. I bequeath to my dear wife all the furniture in the house at ———; I give and bequeath all my horses, and other cattle, and other my live stock, and all my farming and gardening implements and utensils, and also all wines, liquors, stores, and provisions, in or about my house, at ———, aforesaid, to my said eldest son, absolutely; I give to my daughter L. the whole of the furniture belonging to and commonly used in her apartments in ——— house, and to my younger son all my books, plate, china, pictures, linen, household goods and furniture, in the chambers he now resides in, or may reside in or occupy at the time of my decease, and also [various specific bequests.]

A catalogue of the books, and an inventory to be made of the plate, linen, china, pictures, prints, furniture, &c.

One to be delivered to testator's eldest son E —, one to the youngest son, and another to the trustees.

No articles to be removed until such inventory and catalogue shall be made.

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No. 6.

*A regular Settlement upon the Testator's Family.*

THIS is the last will and testament of me, J. B., &c. First, I give and devise all and singular my freehold manors, messuages, lands, tenements, hereditaments and real estates, whatsoever and wheresoever, together with their and every of their rights, members, and appurtenances, unto J. S. and S. J., their heirs and assigns for ever, to the several uses, and upon and for the trusts, intents and purposes hereinafter limited, expressed and declared, of and concerning the same, (that is to

Limitations in strict settlement to testator's sons.

say,) to the use of my eldest son, G. B. and his assigns, for and during the term of his natural life, without impeachment of or for any manner of waste; and from and immediately after the determination of that estate, by forfeiture or otherwise, in his lifetime, then to the use of the said J. S. and S. J. and their heirs, for and during the natural life of my said son, upon trust, to support and preserve the contingent uses and estates hereinafter limited from being defeated or destroyed, and for that purpose to make entries and bring actions, as occasion may require; but nevertheless to permit my said son and his assigns during his life, to receive and take the rents, issues and profits of the said manors and other hereditaments, for his and their own use and benefit; and from and immediately after his decease, then to the use of the first son of the said G. B., lawfully to be begotten, and of the heirs male of the body of such first son lawfully issuing; and for default of such issue, then to the use of the second, third, fourth, and all and every other the son and sons of the said G. B., lawfully to be begotten, severally, successively, and in remainder, one after another as they shall be in seniority of age and priority of birth, and of the several and respective heirs male of the body and bodies of all and every such son and sons lawfully issuing, the elder of such sons and the heirs male of his body always to be preferred, and to take before the younger of such sons and the heirs male of his and their body and bodies; and in default of such issue, then to the son of my second son, J. B., and his assigns, for and during the term of his natural life, without impeachment of or for any manner of waste; and from and immediately after the determination of that estate, by forfeiture or otherwise, in his life-time, then to the use of the said J. S. and S. J. and their heirs, for and during the natural life of the said J. B., upon trust, to support and preserve the contingent uses and estates hereinafter limited from being defeated or destroyed, and for that purpose to make entries and bring actions as occasion may require; but nevertheless to permit my said son J. B. and his assigns during his life, to receive and take the rents, issues and profits of the said manors and other hereditaments, for his and their own use and benefit; and from and immediately after the decease of the said J. B. then to the use of the first son of the said J. B., lawfully to be begotten, and of the heirs male of the body of such first son lawfully issuing; and for default of such issue, then to the use of the second, third, fourth, and all and every other the son and sons of the said J. B., lawfully to be begotten, seve-

rally, successively, and in remainder, one after another as they shall be in seniority of age and priority of birth, and of the several and respective heirs male of the body and bodies of all and every such son and sons lawfully issuing, the elder of such sons and the heirs male of his body always to be preferred and to take before the younger of such sons, and the heirs male of his and their body and bodies; and in default of such issue, then to the use and behoof of my third, fourth, and all and every other my son and sons hereafter to be born, severally, successively, and in remainder, one after another as they shall be in seniority of age and priority of birth, and of the several and respective heirs male of the body and bodies of all and every such son and sons lawfully issuing, the elder of such sons and the heirs male of his body always to be preferred and to take before the younger of such sons and the heirs male of his and their body and bodies; and for default of such issue, then to the use of all and every my daughter and daughters, equally to be divided between or amongst them, if more than one, share and share alike, as tenants in common, and of the several and respective heirs of the body and bodies of such daughter and daughters lawfully issuing; and in case there shall be a failure of issue of the body or bodies of any of such daughters, then as to the share or shares (as well surviving or accruing as original) of such of them whose issue shall so fail, to the use and behoof of the survivors or survivor, and others or other of them, equally to be divided between or amongst such survivors and others (if more than one) share and share alike, as tenants in common, and of the several and respective heirs of the body and bodies of such surviving and other daughter or daughters lawfully issuing; and in case all my daughters but one shall die without issue, then to the use and behoof of such one daughter and the heirs of her body lawfully issuing; and in default of such issue, then to the use of the heirs of my body; and in default of such issue, then to the use of my wife M. B., and her assigns for her life, and from and after her decease, to the use of my brother T. B. his heirs and assigns for ever. Provided always, and my will is that it shall be lawful for my said son G. B., during his life; and also for my said son J. B. during his life, in case he shall come into possession of my said estates, to demise and lease all or any part of my said estates hereinbefore devised unto any person or persons, for any term or number of years not exceeding 21 years in possession, at the best or most improved yearly rent or rents that can be rea-

To the daughters, as tenants in common, with cross remainders.

Remainder to the heirs of testator's body; remainder to his wife for life; remainder to testator's right heir.

Jointuring  
power.

Power for the  
eldest son to  
raise portions  
for younger  
children.

sonably gotten for the same, and without taking any thing by way of fine for or in respect of any such demise or lease, so that the lessee or lessees be not made dispunishable of waste by any express words therein, and do execute a counterpart thereof. Provided also, and my will further is, that it shall be lawful for my said sons, G. B. and J. B. severally and respectively, as and when they shall respectively be in the possession of my said manors, messuages, lands, tenements and hereditaments hereinbefore devised by any deed or deeds sealed and delivered in the presence of, and attested by two or more credible witnesses, to grant, limit or appoint any annual sum or yearly rent-charge not exceeding 500*l.* clear of all taxes and deductions whatsoever, to be issuing out of the said manors and other hereditaments hereinbefore devised, or any part thereof, to or for the use of any woman or women whom they may respectively marry, for the life or lives of such woman or women, by way of jointure; and in bar or without being in bar of dower; such grant, limitation, or appointment to be made either before or after marriage, and with such powers and remedies of distress and entry and perception of the rents and profits of the said manors and other hereditaments, and such term or terms of years, for the better securing and compelling the payment of such annual sum or yearly rent-charge, as to them my said sons respectively shall seem meet. Provided also, and my will further is, that it shall be lawful for my said son G. B., by any deed or deeds, or by his last will and testament, or any codicil thereto duly executed and attested, to subject and charge my said manors and other hereditaments hereinbefore devised, or any part thereof, to and with the payment of any sum or sums of money not exceeding the sum of 10,000*l.* for the portion or portions of any daughter or daughters, or younger son or sons of him the said G. B. (but so that the same be not made to vest in sons under the age of 21 years, or in daughters whilst under that age and unmarried,) with such benefit of survivorship or accruer between or amongst them if more than one, and with such yearly sum or sums in the mean time, till such portion or portions shall become payable for maintenance and education, but not exceeding the interest of such portion or portions at and after the rate of four per cent. per annum; and also to limit such term or terms of years to trustees, for raising the same, and securing the payment thereof in the usual manner, as to him, the said G. B., shall seem meet. Provided also, and my will further

is, that if my said son G. B. shall not charge my said manors, and other hereditaments, with the full sum of 10,000*l.* for the portions of his younger children, or if the full sum of 10,000*l.* shall not eventually become payable for such portions, then it shall be lawful for my said son, J. B., in case, and when he shall come into the possession of the same manors and hereditaments, by any deed or deeds, or by his last will and testament, or any codicil thereto, duly executed and attested, to subject and charge the same manors, and other hereditaments, or any part thereof, to and with the payment of any sum or sums of money, for the portion or portions of any daughter or daughters, or younger son or sons of him, the said J. B. not exceeding such a sum, as with what shall become payable for the portion or portions of the younger child or children of the said G. B. will make up the sum of 10,000*l.* or not exceeding the sum of 10,000*l.*, in case no sum at all shall become payable for the portion or portions of the younger child or children of the said G. B., (but so that the same be not made to vest in sons, under the age of 21 years, or in daughters whilst under that age, and unmarried,) with such benefit of survivorship or accruer between or amongst them, if more than one, and with such yearly sum or sums in the mean time, till such portion or portions shall become payable, for maintenance and education, but not exceeding the interest of such portion or portions, after the rate aforesaid, and also to limit such term or terms of years to trustees, for raising the same, and securing the payment thereof, in the usual manner, as to him, the said J. B. shall seem meet. Also, I give and bequeath unto my said wife, M. B. for her own absolute use and benefit, all my linen, china, and household goods, and household furniture, of every kind and sort whatsoever (except plate.) And also, all my liquors, coals, wood, and provisions of every kind, in or about my dwelling-house, or houses, at the time of my decease; and also all the watches, rings, trinkets, and other ornaments of her person, usually worn by her, or called hers, together with all her wearing apparel, and paraphernalia whatsoever, save and except the jewels hereinafter otherwise disposed of; also, I give and bequeath unto my said wife, during her life, the use and enjoyment of all my plate, and of all the jewels she received on our marriage, of which I desire an inventory may be made and signed by her, after my decease, but recommending her to accommodate my said son G. B., or the person or persons for the time being, entitled to the possession of my estates, hereinbefore devised in strict settlement,

Similar power to the second son to a restricted extent.

Furniture, &c. (except plate,) provisions, ornaments of the person, (except jewels after disposed of,) to the wife, with directions to keep an inventory.



Plate, jewels,  
and portraits,  
to go as heir-  
looms.

Executors to  
finish the al-  
terations and  
improvements  
intended to be  
made in and  
about the  
house at —.

Testator's wife  
to have the use  
of the house  
for her resi-  
dence till the  
eldest son at-  
tains 21.

And to have  
the right of  
presentation  
to the rectory  
of — during  
the minority of  
the eldest son  
or the person  
entitled for the

under or by virtue of the limitations hereinbefore contained, with the use of such part of the plate as she can conveniently spare, and he or they may have immediate occasion for; and from and after the decease of my said wife, I give and bequeath all my said plate and jewels unto the said J. S. and S. J., their executors and administrators, to whom I also bequeath the portraits of, &c. immediately in trust for, and to permit the same respectively to be held and enjoyed by the person or persons, who shall from time to time be entitled to the possession of my said manors, and other hereditaments hereinbefore devised in strict settlement, and for such and the same estate and interest therein, to the intent that the same may go and be enjoyed, with such manors, and other hereditaments, as, or in the nature of heir-looms as far as the law will permit; and in order thereto, my will is, that no person taking an estate tail, by purchase, in my said manors, and other hereditaments, or any part thereof, shall be entitled to such an absolute or vested interest in the said plate, jewels, and portraits, as would be transmissible to his or her executors or administrators, unless such person shall attain the age of 21 years, or die under that age, leaving issue inheritable under such intail, living at his or her decease. And it being my intention to make some alterations and improvements in and about my house at T., my will is, and I hereby direct, that if the same shall not be completed in my lifetime, then the same shall be completed and finished after my decease, in such manner as my executrix shall think proper and direct; and the charges and expenses attending the same shall be paid out of the rents and profits of my estates at — and —, in the said county of —, which I hereby authorise and empower my executrix to receive and take for that purpose. And my will is that my wife, M. B., shall have the use and enjoyment, for her own residence only, of my said house at T. with the stables, offices, and out-buildings, yards, gardens, lawns, plantations, and pleasure grounds thereunto belonging, and of the home close and meadow, at the bottom thereof, until my said son, G. B., or the person or persons for the time being entitled thereto, under the limitations hereinbefore contained, shall attain the age of 21 years. Also, I give and bequeath unto my said dear wife, if she shall be living, the right of presentation to the rectory of T., in case and as often as the same shall become vacant, during the minority of my said son, G. B. or of the person or persons for the time being entitled to the advowson thereof, under the devise and limita-



tions hereinbefore contained; also I give and bequeath unto the said J. S. and S. J. the principal sum of 2000*l.* or thereabouts, due to me on a promissory note from the late Lord B—; and in case the same shall be received by me in my lifetime, then I give and bequeath to them the sum of 2000*l.* in lieu thereof, immediately after my decease, in trust to be by them laid out or invested in or upon government or other public stocks or funds, or upon real securities, at interest, with full power to change such stocks, funds, and securities, and those which shall be substituted in lieu thereof, for others of the like kind, as often as shall be thought expedient, and upon trust to permit my said wife to receive and take the yearly dividends, interest, or produce of such stocks, funds, or securities, for her use and benefit, during her life; and from and after her decease, my will is, that such stocks, funds or securities, shall fall into, and go, and be considered as part of my residuary personal estate; and I give and bequeath all the rest, residue, and remainder of my monies, stocks, funds, and securities for money, goods, chattels, and personal estate and effects whatsoever, and wheresoever, not hereinbefore disposed of, and which shall remain after payment of my debts and funeral and testamentary expenses, unto my said wife, and the aforesaid J. S. and S. J., their executors and administrators, upon trust to call in and convert the same into money as soon as conveniently may be after my decease, and to lay out and invest the money so to be called in, and to arise from my said residuary personal estate in or upon government, or other public stocks or funds, or upon real securities at interest, with full power and authority to sell, dispose of, alter, vary, and change such stocks, funds, and securities, and those which may be substituted in lieu thereof, for others of the same or the like nature, as often as shall be thought expedient; and upon trust, as to all and singular the stocks, funds, and securities, which shall, from time to time, constitute or form part of my residuary personal estate, for all and every of my children living at my decease, and born in due time afterwards, (save and except my said son, G. B., or such other son as shall then be entitled to my said manors and other hereditaments hereinbefore devised in strict settlement,) who, being a son or sons, shall then have attained, or shall afterwards attain the age of twenty-one years, or being a daughter or daughters, shall then have attained, or shall afterwards attain the like age, or be married under that age, and for their respective executors and administrators, equally to be divided between or amongst them, if more than

time being to the advowson. A sum to be invested in the funds, and dividends to be paid to the wife for life, and after her decease to fall into the residue.

All the residue to be collected got in and converted into money and invested in the funds, with power to vary and transpose, &c.

To apply the same for the benefit of the younger children.

To be equally divided.

With power to apply their presumptive shares for, and towards their maintenance.

And for their advancement in the world.

And if all the children die except G. B., then the whole in trust for the eldest or other son entitled to the settled hereditaments, and to transfer the same to him when of age, and in the mean time to apply the dividends towards his maintenance; and if he shall die under age, in trust for the wife during life, and after her decease to testator's brother.

one, share and share alike; and if there shall be but one such child, who shall attain the age or time aforesaid, then as to the whole in trust for such one child, and his or her executors and administrators, and to transfer, assign, and make over the same accordingly, as soon as circumstances will permit; and upon further trust, until such stocks, funds, and securities shall become transferable or assignable as aforesaid, to pay, apply, and dispose of, the yearly dividends, interest, and produce of the presumptive share or shares for the time being, of the child or children, who shall not have attained the age or time aforesaid, of and in the said stocks, funds, and securities, for or towards the maintenance and education of such child or children respectively, until he she or they shall acquire a vested interest therein, or die, which shall first happen; and my will further is, that it shall be lawful for my said trustees, or the survivors or survivor of them, or his or her executors or administrators, at their his or her discretion, to apply and dispose of any part or parts of the presumptive share or shares, for the time being, of any son or sons, under the age of 21 years, of and in the said stocks, funds, and securities, for placing him or them out in any profession, business, or employment, or for his or their instruction therein, or otherwise for his or their benefit or advancement in the world, notwithstanding such share or shares shall not then have become vested; and in case all my said children, except my said son G. B., or the son, who at my decease shall be entitled to my said manors, and other hereditaments hereinbefore devised in strict settlement, shall die, without any of them having acquired a vested interest in the said stocks, funds, and securities, then my will is, and I hereby direct, that my said trustees shall stand, and be possessed of all such stocks, funds, and securities (save and except such part thereof, if any, as may have been applied for the advancement of any younger son or sons, whilst under age as aforesaid,) in trust for him, my said son, G. B., or such other son as shall, at my decease, be entitled to my said manors, and other hereditaments hereinbefore devised in strict settlement; and to transfer, assign, and make over the same to him accordingly, at his age of 21 years, or as soon after as circumstances will permit, and in the mean time to apply the yearly dividends, interest, or produce, or any part thereof, for or towards his maintenance and education; and in case of his decease, under the age of 21 years, then upon trust for my said wife, M. B., for and during her life, and after her decease in trust for my said brother, T. B., his executors and administrators, for his and their own abso-

lute use and benefit. I nominate and appoint my said wife, M. B., sole executrix of this my last will and testament; I also appoint her guardian of all such of my children as shall be infants, during their respective minorities; and I give and devise unto my said wife, and the said J. S. and S. J., and their heirs, the legal estate of all such messuages, lands, tenements and hereditaments, as are vested in me, in fee simple, or for any estate of freehold, by way of mortgage, or as a security for money, to the intent that they may be enabled to convey and dispose of the same, in such manner as occasion shall require. And my will is, and I hereby declare, that my said trustees and executors, or any of them, their or any of their heirs, executors, or administrators, shall not be charged, or chargeable with, or accountable for any more of the trust monies and premises, than they shall respectively actually receive, or shall come to their respective hands, by virtue of this my will, nor with or for any loss which shall or may happen of the said trust monies and premises, or any part thereof, so as such loss happen without their wilful neglect or default; nor any of them, for the others or other of them, or for the acts, deeds, receipts, disbursements, or defaults of the others or other of them, but each of them, only for his or her own acts, deeds, receipts, disbursements, and defaults. And also that it shall and may be lawful to and for them my said trustees and executors, and their respective executors and administrators, in the first place, by and out of the monies which shall come to their hands respectively by virtue of this my will, to deduct, retain to, and reimburse themselves respectively all such costs, charges, damages, and expenses as they shall respectively pay, bear, sustain, expend, or be put unto, for or by reason or means of the trusts hereby in them reposed, or the management or execution thereof, or any act, transaction, matter or thing whatsoever in any wise relating thereto. And, lastly, I hereby revoke all former wills by me at any time heretofore made.

The wife sole executrix and guardian.

Indemnity clause.

In Witness, &c.

## No. 7.

*A Will with limitations of the real property to the children successively and their sons and daughters in fee with a variety of other provisions by way of annuity and otherwise.*

THIS is the last will and testament of me I. S. in the county of Northampton, Esquire. I desire that my body may be deposited in the vault wherein my late dear father was buried at ——— in the county of ———, with suitable decency, but without funeral pomp. And whereas I am seized of the fee simple and inheritance of the manor of N. in the county of N. aforesaid, and divers hereditaments purchased by me from ———, and also divers messuages, lands, and hereditaments in the parishes of A. and B. in the counties of H. and D., and purchased by me from D. C., esquire, and also of divers other messuages, lands, cottages, and hereditaments at S. in the said county of N., and lately purchased by me of C. D. and E. F., and also of a messuage or dwelling house and divers lands and hereditaments at V. in the county of Sussex purchased by me of F. T., esquire, and also of divers messuages lands and hereditaments at L——y in the parish of T. in the said county of S. and lately purchased by me of H. P. L. and his trustees. And whereas the said messuages, lands, and hereditaments at L——y are subject to the payment of the sum of 4100*l.* to L. T. S. and F. (the trustees named in an indenture of settlement bearing date, &c. being the settlement made on my marriage with my present wife M. S.) which sum was advanced by them for my use out of the trust monies of such settlement; now I give and devise my said manor and all other my freehold messuages, lands, tenements, hereditaments, and real estate whereof I have power to dispose in possession, reversion, remainder, or expectancy, (save and except the said messuage, lands, and hereditaments at V. hereinafter devised) with their and every of their rights, members, and appurtenances, subject nevertheless to such charges and incumbrances as the same premises or any of them shall be at the time of my decease subject or liable to, and subject also to the pay-

Devise of freehold and copyhold estates (except those at V.)

ment of the several annuities hereinafter bequeathed, to X., Y., and Z. their heirs and assigns; to the uses, upon the trusts, and for the intents and purposes, and subject to the provisos and declarations hereinafter limited and contained concerning the same, that is to say; to the use of my eldest son W. S. if he shall attain the age of 21 years, or shall be married with the consent in writing of any three of the trustees for the time being of this my will which shall first happen, and his assigns, for the term of his natural life without impeachment of waste; and from and after the determination of that estate by forfeiture or otherwise in his life time, to the use of the said X., Y., and Z. and their heirs during the life of the said W. S., upon trust by the usual means to preserve the contingent remainders hereinafter limited from being destroyed; but nevertheless to permit my said son W. S. and his assigns during his life to receive and take the rents and profits of the same premises for his and their use, and from and immediately after the decease of the said W. S., to the use of such one son of my said son W. S. lawfully begotten who shall attain the age of 25 years, or be married with such consent as aforesaid, which shall first happen, as he my said son W. S. by any deed or deeds, writing or writings, to be by him sealed and delivered in the presence of and attested by two or more credible witnesses, or by his last will and testament in writing, to be signed and published by him in the presence of and attested by three or more credible witnesses shall direct and appoint, and the heirs and assigns of such son for ever; and in default of any such direction or appointment, to the use of the eldest of the sons (if more than one) of my said son W. S. who shall live to attain the age of 25 years, or be married with such consent as aforesaid, which shall first happen and the heirs and assigns of such son for ever; but if there shall be only one such son who shall live to attain such age, or be married with such consent as aforesaid, then to the use of such one only son, his heirs and assigns. And in case my said son W. S. shall depart this life without leaving any son who shall live to attain the said age of 25 years, or be married with such consent as aforesaid, then to the use of my second son G. S. if he shall attain the age of 25 years, or be married with such consent as aforesaid, which shall first happen, and his assigns, for and during the term of his natural life without impeachment of waste; and from and after the determination of that estate by forfeiture or otherwise in his life-time, to the use of the said X., Y., and Z. and their heirs, during

To his eldest son W. S. for life; and after his decease,

To such one son of the said W. S. as he by deed or will shall appoint, and the heirs and assigns of such son.

In default thereof to the eldest of his sons (if more than one) or an only son who shall attain 25, his heirs and assigns.

Like dispositions in favour of testator's other sons.

In default of children in the male line to the eldest of the sons of his daughter E. S. (if more than one) or an only son who shall attain 25, his heirs and assigns.

In default, &c. to the eldest of the sons of his daughter R. S. (if more than one) or an only son who shall attain 25, his heirs and assigns.

Devise of copyholds to the same uses as the freehold, or as near thereto as the tenure will permit.

the life of the said G. S., upon trust by the usual means to preserve the contingent remainders hereinafter limited from being destroyed, but nevertheless to permit the said G. S. and his assigns during his life to receive and take the rents and profits of the same premises for his and their use; and from and immediately after the decease of the said G. S. [like dispositions to other sons and the first of their sons who shall live to attain the age of 25 respectively.] And in case all my sons shall depart this life without leaving any son who shall live to attain the said age of 25 years, or be married with such consent as aforesaid, then to the use of the eldest of the sons of my daughter E. S. to be lawfully begotten (if more than one) who shall live to attain the age of 25 years, or be married with such consent as aforesaid, which shall first happen, and the heirs and assigns of such son for ever; but if there shall be only one such son of my said daughter E. S. who shall live to attain such age or be married with such consent as aforesaid; then to the use of such one only son his heirs and assigns for ever; and in case my said daughter E. S. shall not have any son who shall live to attain the said age of 25 years or be married with such consent as aforesaid, then to the use of the eldest of the sons of my daughter R. S. to be lawfully begotten (if more than one) who shall live to attain the age of 25 years, or be married with such consent as aforesaid, which shall first happen, and the heirs and assigns of such son for ever; but if there shall be only one such son of my said daughter R. S. who shall live to attain such age or be married with such consent as aforesaid, then to the use of such one only son, his heirs and assigns for ever; and in case both my said daughters shall depart this life without leaving any son who shall become entitled to the said hereditaments under and by virtue of this my will, then to the use of my right heirs. And I give and devise all my copyhold and customary messuages, lands, tenements, and hereditaments, wheresoever situated, to the said X., Y., and Z. their heirs and assigns, to hold the said copyhold and customary messuages, lands, tenements and hereditaments to and for the use of them, their heirs and assigns, upon such trust nevertheless, and to for with and subject to such uses, estates, intents, purposes, powers and provisions as shall best correspond with the uses, estates, intents, purposes, powers and provisions hereinbefore expressed, given, limited and declared of and concerning my said freehold messuages, lands, tenements, hereditaments and



premises, or as near thereto as the nature and quality of such copyhold and customary estate and tenure will admit of. And I further declare my will to be, that in case my faithful farming servant L. K. shall be living at my decease, that then and in such case the person who by virtue of the dispositions hereinbefore contained shall be beneficially entitled to the possession whether for life or other greater estate of my said lands and hereditaments hereinbefore mentioned to have been purchased of D. C., esquire; or in case such person shall be a minor, his guardian or guardians shall and do within one month after my decease in case the said L. K. shall request the same, by indenture or other effectual assurance in the law containing the usual covenants, grant and demise unto him the said L. K. the same last-mentioned lands and hereditaments which are now in my occupation for the term of 14 years, in case he shall so long live and continue himself to occupy the same lands and hereditaments, such term to commence and be computed from one month or 28 days after the day of my decease; and my will is, and I direct in case the said L. K. shall be living at my decease that the farming stock and implements of husbandry which shall be upon my said lands and hereditaments which I have hereinbefore directed to be demised to the said L. K. shall, if he shall request the same, be valued by two indifferent persons, one to be chosen by him and the other by the trustees hereinafter named concerning my residuary estate or the survivors or survivor of them his executors or administrators: but in case such two persons cannot agree in such valuation, then by a third indifferent and competent person to be named by the same two persons so first appointed, and that the said L. K. shall have the privilege of purchasing the said farming stock and implements of husbandry for the sum at which the same shall be so valued, and that 1000%. part of such sum shall and may remain secured to be paid by him to the said trustees or trustee by his bond and by a judgment to be entered thereupon, in pursuance of a warrant of attorney to be executed by him, such payment to be made at the expiration of seven years from the time of my decease with interest in the mean time on such sum at the rate of 4%. per cent. per annum by equal half-yearly payments; but in case he shall happen to die before the expiration of the said term of seven years, or become insolvent or a bankrupt, my will is that the said sum of 1000%. with such interest as shall be then due thereon according to the rate aforesaid, shall become immediately payable out of, and charged

Directions that a lease of the estate purchased of D. C. shall be granted to L. K. for 14 years if he shall, so long live and continue to occupy it.

Testator directs that his farming stock shall be valued, and L. K. shall have the privilege of purchasing it at such valuation, and 1000%. thereof may remain for 7 years on the security of his bond, and judgment, at interest: the same however, in the event of his death or insolvency before the expiration of such term, to become payable out of the stock which shall then be on the said lands.



Devise of the dwelling house and hereditaments at R—.

To trustees in trust for the use of testator's wife for her life, in case she may choose to reside there, and otherwise to pay the rents to her for her life, for her separate use, and after her decease,

Upon trust to sell the same.

and chargeable upon, the farming stock and implements of husbandry which shall be upon the said lands and hereditaments at the time of such his decease insolvency or bankruptcy. And I further direct that in such lease so to be made to the said L. K. may be contained a proviso for making the same void in the event of such insolvency or bankruptcy as aforesaid, and that the said bond and warrant of attorney may be so framed as that, in case of the death of the said L. K. before the said 1000<sup>th</sup>. and all interest shall be satisfied and paid, execution may immediately be taken out and had thereupon. I give and devise my messuage or dwelling house, and all those lands, tenements, hereditaments and premises situate and being at V. in the county of Sussex, and hereinbefore mentioned to have been purchased from F. T., esquire, with their and every of their rights, members, and appurtenances unto the said X., Y., and Z. their heirs and assigns; to the uses upon the trusts and for the intents and purposes hereinafter expressed concerning the same, that is to say, to the use of the said X., Y., and Z. and their heirs during the life of my wife the said M. S., in trust to permit my said wife to hold and enjoy the same during her life; but in case she shall not choose to occupy the same, then in trust to pay the rents and profits thereof, or of so much as she may not choose to occupy, as the same shall accrue due and be received, unto such person and persons only, and for such intents and purposes only as my said wife by writing under her hand, notwithstanding any coverture, shall from time to time direct or appoint the same to be paid; and in default of and until such direction or appointment to pay the same, or so much whereof she shall from time to time make no such appointment, into her proper hands; and my will is that the receipts of my said wife under her hand, or the receipts of such person or persons as she shall appoint to receive the same as aforesaid, shall be the only effectual discharges for the same (notwithstanding any coverture) to the end that the same may be for her sole and separate use and disposal, and not subject to the debts, engagements, or controul of any person with whom she may be intermarried; and from and immediately after the decease of my said wife, upon trust that they the said X., Y., and Z., or the survivors or survivor of them, or the heirs or assigns of such survivor, shall and do in the month of August next after her decease make sale and dispose of the said messuage or dwelling-house, lands, tenements, hereditaments, and premises situate at V. aforesaid, either together or in parcels, by public

auction for the most money that can be reasonably obtained for the same. And I declare my will to be that the money which shall arise by such sale shall be considered as part of the residue of my personal estate hereinafter disposed of, and be applied accordingly, and that the receipt or receipts in writing for such money or any part or parts thereof signed by the said X., Y., and Z. or the survivors or survivor of them, or the heirs executors or administrators of such survivor shall be a sufficient discharge or sufficient discharges to such purchaser or purchasers for his her and their purchase money or monies, or for so much of such money as in such receipt or receipts respectively shall be acknowledged or expressed to have been received; and that after such receipt or receipts shall have been so signed, the purchaser or purchasers of the said premises hereby made saleable or any part thereof to whom such receipt or receipts as aforesaid shall be given, shall not be obliged to see to the application or be answerable or accountable for the misapplication or nonapplication of his her or their purchase money or any part thereof. And whereas the said messuage or tenement wherein I formerly dwelt in the parish of ——— in the said county of ——— was by the indenture of settlement made previous to my marriage with my said wife M. S. settled for her benefit during her life in remainder expectant on my decease, and by virtue of the said settlement I am authorised to dispose of the said premises, subject nevertheless to the said life interest of my said wife either by my last will and testament or otherwise, now I do hereby ratify and confirm the said settlement in every respect, and subject to the said estate and interest of my said wife, and in pursuance and exercise of the power and authority thereby reserved to me, and of every other power or authority enabling me in that behalf, I give, bequeath, direct, limit and appoint the said messuage or tenement and premises comprised in the said settlement, and also all the estate and interest which I now possess, or to which I am entitled, of and in a certain leasehold dwelling house in the parish of ——— purchased by me of ———, and also the leasehold messuage or tenement purchased by me from the executors of the late ——— esquire, and adjoining to the first mentioned messuage and premises, all which said several hereinbefore mentioned leasehold messuages or tenements and premises are partly in the occupation of myself and the said ——— and ———, and are used by us in the trade or business of ———, with their and every of their rights, members, and appurtenances, and also all other my leasehold premises in ——— aforesaid, and all my

The monies to arise by such sale to be considered as part of the residue of his personal estate.

Receipts of trustees to be effectual discharges to purchasers.

Confirmation thereof, and subject to the estate of the testator's wife.

Bequest of the premises therein comprised, and also of all other leasehold premises in ———.

To trustees  
upon trust.

To demise and  
manage the  
same in the  
most advan-  
tageous way,  
and to pay the  
clear rents to  
M. S. for her  
life, for her  
separate use.

Bequest to tes-  
tator's wife of  
the household  
and other fur-  
niture at V.

To the wife  
3000*l.*; 500*l.* of  
which to be  
paid within 14  
days after tes-  
tator's decease.

And also the  
coach and a  
pair of the best  
coach horses,  
with the har-  
ness, &c.

estate, interest, and terms of years therein respectively, unto the said X., Y., and Z., their executors, administrators and assigns, upon the several trusts, for the intents and purposes, and subject to the several provisos and declarations hereinafter expressed, (that is to say) in trust that they the said X., Y., and Z., or the survivors or survivor of them, his executors or administrators, shall and do let, demise and manage the same in such manner as they or he, with the consent of my said wife during her life, and afterwards at their or his discretion, shall deem most advantageous; and, after deducting the rent, taxes, repairs and other outgoings for or on account of my said leasehold messuage, or tenements and premises, do and shall pay the clear residue or surplus of the rents, issues and profits thereof respectively, as the same shall become due and payable, and be received, unto my said wife M. S. and her assigns, for and during the term of her natural life, or unto such person or persons as she shall from time to time, by writing under her hand, appoint to receive the same; to the end that the same may be for her sole and separate use and benefit, and not subject to the control, debts and engagements of any husband with whom she may intermarry; and my will is, that the receipts of my said wife, under her hand, notwithstanding any coverture, shall be the only effectual discharges for the same: and from and after the decease of my said wife, upon trust, to assign and transfer the said leasehold messuages, tenements and premises, with the appurtenances, unto the eldest of my said sons, who shall be living at the decease of my said wife, M., his executors, administrators and assigns, for the residue which shall be then unexpired, of the several terms of years for which the same respectively are held. I give and bequeath to my said wife M. S., all the household and other furniture, goods, chattels and effects, which shall be in and about my said messuage, or dwelling-house and premises at V——, at the time of my decease; and also all such of my plate, linen, china, jewels and wearing apparel as are not hereinafter by me specifically disposed of; I also give and bequeath to my said wife M. S. the sum of 3000*l.* of lawful money of Great Britain, 500*l.*, part of which, I direct shall be paid to her within fourteen days after my decease, and the remaining 2,500*l.* within two months after my decease; I also give and bequeath to my said wife M. S., her executors and administrators, for her absolute use, my coach and a pair of my best coach horses at her election, together with all the harness, trappings and furniture belonging thereto. I give and bequeath all the household furniture and fixtures, in and about

my said dwelling-house at S., and also all the wines, spirits, and other liquors which shall be in the cellars of my said last-mentioned dwelling-house, or elsewhere, at the time of my decease, unto such one of my sons or grandsons who shall become first entitled to an estate for life, or other estate in possession, in my said freehold and copyhold hereditaments hereinbefore first devised, under or by virtue of the limitations hereinbefore-mentioned, hereby directing and enjoining him to supply my dear wife with such parts thereof as she may require to stock the cellars of my said house at V. I give and bequeath to my nephew, T.S., son of my brother C.S., the silver——, &c. &c. As to my two silver bowls, and two pair of my silver candlesticks, one silver tea urn and one silver bread basket, I give the use thereof to my said wife, M.S., for the term of her life; and from and after her decease I give and bequeath the same as follows; (that is to say,) to &c. &c. I give to my brother, I.S., an annuity of 200*l.* of lawful money of Great Britain, to be paid to him during the term of his natural life, by equal quarterly payments, and the first quarterly payment thereof to be made at the expiration of three calendar months next after my decease, and I charge the residue of my personal estate with the payment thereof. Provided nevertheless, and my will is, that the said annuity shall be paid into his proper hands, from time to time, as the same shall become due, and that the receipts of my said brother only shall be good and sufficient discharges for the payment thereof; and my will also is, and I declare that in case my said brother shall grant, bargain, sell, transfer, assign, alien, incumber, or in any manner dispose of or anticipate the said annuity or any part thereof, the same annuity shall thenceforth immediately cease and be void to all intents and purposes, in such manner as if the same had not been mentioned in this my will, or as if my said brother were dead. Provided also, and I declare my will to be that in case my said brother shall become bankrupt, or take the benefit of any act of parliament to be made for the relief or discharge of insolvent debtors, that then and in either of the said cases the said annuity shall cease and be at an end, unless or until my said brother, who shall so become bankrupt or take the benefit of such insolvent act, shall or may be entitled to, or shall be in a capacity to receive the said annuity for his own private use, notwithstanding such events, or either of them, may have happened; it being my intention that the said annuity shall be for the private use and benefit of my said brother, and not be in any manner transferable to or for the use of any other person

Bequest to his son W. S. of the household furniture in his dwelling-house at S. and all wines and liquors, directing him to supply his mother with such quantities as may be necessary to furnish her cellars at V.

Sundry bequests of the articles of plate.

Bequest to J.S. of an annuity of 200*l.* during his life, to be unalienable.

Nevertheless the same not to affect the sum of ———. hereinafter set apart for the separate use of the testator's wife.

Executors 100*l.* each.

To the trustees such a principal sum as will purchase 100*l.* per annum in the funds, to be purchased in their names, and to be applied in payment of the following annuities, *vis.*

Direction that the annuities given to ——— and ———, should be for their separate uses.

or persons; and it is my will that the said annuity shall be paid to my said brother, notwithstanding he may be indebted to me or my estate in any manner, at the time of my decease, and that such debt shall not be set off against or deducted from the said annuity. Provided also, and I hereby declare my will to be that the said annuity shall be without prejudice to the said legacy of 5000*l.* which is hereinafter directed to be set apart for the benefit of my said wife. I give and bequeath [various pecuniary bequests;] I also give and bequeath to the said X., Y., Z., hereinafter appointed executors of this will, the sum of 100*l.* each, of like lawful money of Great Britain, as some compensation for the trouble they will have in the performance of the trusts, or otherwise in or about the execution of this my will. I give and bequeath to the said X., Y., Z., their executors, administrators and assigns, such a principal sum of money as will be sufficient to purchase at the then market price a quantity of stock, in some or one of the public funds, the interest or dividends whereof shall amount to 100*l.* per annum; and I direct such principal sum to be invested in the purchase of such stock directly, or as soon as conveniently may be after my decease, and to stand in their names, or in the names or name of the survivors or survivor of them, or the executors, administrators or assigns of such survivor, upon trust that they the said X., Y., Z., or the survivors or survivor of them, or the executors or administrators of such survivor, do and shall, out of the interest and dividends of such stock, pay the annual sums hereinafter mentioned, to the several persons following (that is to say) to [here follow several small annuities]. And my will is, and I direct that the several annuities hereinbefore by me bequeathed and made payable out of the said 100*l.* per annum, to arise from the stock so purchased, shall be respectively paid by equal half yearly payments, and that the first of such payments shall commence and be made the next day on which the said interest and dividends shall be payable, or as near thereto as may be convenient, after the day of my decease. And further I declare my will to be that the said several annuities, hereinbefore respectively given to the said ——— and ———, shall be paid to them respectively, or to such person or persons as they respectively shall, by writing under their respective hands, appoint to receive the same, to the end that the same annuities may be for their respective separate uses, and not subject to the controul, debts or engagements of the respective husbands with whom they may happen to be intermarried at the time of my decease, or at any time afterwards; and



that the respective receipts of the said — and — for their said respective annuities, shall be the only sufficient discharges for the payment thereof respectively. I give and bequeath to —, the sum of 800*l.* of lawful money of Great Britain, to be paid when he shall have attained the age of 21 years, at which time only it shall become a vested interest; and I do direct that in the mean time the same shall be invested in some or one of the parliamentary stocks or funds, and the interest thereof applied towards his maintenance and education. I bequeath to such of my friends as my executors shall think proper, not exceeding — in number, a ring of the value of —. I give and bequeath to each of my servants who shall be living with me at the time of my decease suitable mourning, at the discretion of my executors. And as to all the rest, residue and remainder of my personal estate, I give and bequeath the same unto the said X., Y., Z., their executors, administrators and assigns, upon trust and to the intent and purpose that they the said X., Y., Z., or the survivor of them, or the executors or administrators of such survivor, shall and do sell and dispose of so much of the said residue of my personal estate as shall not consist of debts, and which shall not already be invested in real or government securities, for the best price that can be reasonably obtained for the same; and shall and do collect in such debts; and my will is, and I direct, that they, the said X., Y., Z., or the survivors or survivor of them, or the executors or administrators of such survivor, do and shall, by and out of the monies which shall arise thereby, pay unto the said trustees of my said settlement the said sum of —*l.* hereinbefore mentioned to have been advanced by them for my use, or so much thereof only (if any) as shall remain unpaid at the time of my decease, and do and shall place out and invest the residue of such monies, after paying thereout my debts, funeral, and testamentary charges and expenses, and the legacies hereinbefore bequeathed, in or upon some of the parliamentary stocks or funds, or on real securities in England at interest, and do and shall vary, alter, or transpose such stocks, funds, or securities, for others of the like nature, when, and so often as it shall seem meet, and do and shall stand, and be possessed of, and interested in, the said principal monies, stocks, funds, and securities upon the trusts, and to and for the intents and purposes hereinafter declared or expressed, concerning the same, (that is to say) as to and concerning the sum of 6000*l.* sterling money, part thereof, or the stocks, funds, or securities, in or upon which so much of the said monies shall be invested upon trust

The residue of his personal estate he bequeaths to trustees upon trust to sell and convert the same into money, and to invest such money in real or government securities, or in the public stocks, after paying thereout in the first place the said sum of —*l.* mentioned to have been borrowed of the trustees of the settlement; and also all debts and funeral expenses; and to stand possessed thereof upon the trusts afterwards mentioned, *viz.* as to 4000*l.* sterling, part thereof, upon trust to pay the dividends thereof to the wife, for her life, for her separate use.

Upon trust to be applied in the same manner as is afterwards directed, concerning the residue thereof, viz.

As to the residue of such monies and funds; upon trust to assign the same to and amongst all the children of testator by the said M. S., in the proportions following, viz. to each of the daughters, one 8th part, remainder to be equally divided amongst the sons; and to be assigned to sons at 21, and daughters at 21 or marriage, if

that they, the said X., Y., Z., or the survivors or survivor of them, his executors or administrators, shall and do pay, apply, and dispose of the interest, dividends, and yearly proceeds thereof, unto such person or persons only, and for such intents and purposes only, as my said wife, M. S. shall, from time to time, direct or appoint, by writing under her hand, notwithstanding any coverture she may be under; and in default of, and until such direction or appointment, shall and do pay the same, or so much, whereof she shall from time to time make no such appointment into her proper hands, for her sole and separate use and benefit, during the term of her natural life, independently of the controul, debts, or engagements of any husband with whom she may intermarry; and my will is that her receipt or receipts under her hand, notwithstanding any such coverture, shall be the only sufficient discharge and discharges for the payment thereof: and from and after the decease of my said wife, upon trust, that they, the said trustees, or the survivors or survivor of them, or the executors or administrators of such survivor, shall and do pay, transfer, or assign the same unto such of my children by my said wife, M. S., whether born in my lifetime, or in due time after my decease, in such shares and proportions, (or the whole to an only child,) and for such estate and interest, and in such manner and form, and payable or transferable at such time or times, and subject to such limitations and directions as are hereinafter mentioned, expressed, and declared of and concerning the residue of such principal monies, stocks, funds, and securities; and as to and concerning the residue of the said principal monies, stocks, funds, and securities upon trust, that they, the said trustees or the survivors or survivor of them, or the executors or administrators of such survivor, shall and do pay, transfer, or assign the same unto and amongst all and every my child and children by the said M. S. my wife, whether born in my lifetime, or in due time after my decease, if but one, the whole to such one child; but if more than one, then the same to be divided and distributed between and amongst them, in the proportions and manner following, that is to say, to each of my daughters a proportion of one-eighth part of such residue of the said principal monies, stocks, funds, and securities, and the residue and remainder thereof, between and amongst my sons, in equal shares and proportions, share and share alike, the share and shares of such of them as being a son or sons shall have attained the age of 21 years, or being a daughter or daughters, shall have attained that age, or shall



have been married in my lifetime, with my consent, to be assigned and transferred to him her or them respectively, as soon as conveniently may be after my decease, and the share or shares of such of them as being a son or sons shall be then under the age of 21 years, to him or them respectively, upon his or their respectively attaining such age, and the share or shares of such of them as being a daughter or daughters shall be then under the age of 21 years, and shall not have been married with such consent as aforesaid, upon her or their attaining the said age, or as soon after as circumstances will permit, the same to be considered as a vested and transmissible interest, or vested and transmissible interests in such son or sons, upon his and their attaining the age of 21 years, and in such daughter or daughters, upon her or their attaining that age, or being married as aforesaid. And if any such child or children, being a son or sons, shall depart this life under the age of 21 years, or being a daughter or daughters, shall depart this life under that age, and without having been married with such consent as aforesaid, then all and every the share and shares of him her or them respectively, so dying, shall accrue, and go to the survivors or survivor, or others or other of my said children, as is hereinbefore directed with respect to their original shares, if more than one, and the same respectively shall become vested and payable, or transferable at such ages, days, and times, as their his or her original share or shares shall respectively become vested and payable, or transferable, as aforesaid, and shall, together with the original share or shares, until such ages, days, and times respectively, be subject to a similar chance and condition of accruer and survivorship. Provided also, and I do hereby further declare, that it shall and may be lawful to and for the said trustees, or the survivors or survivor of them, or the executors or administrators of such survivor, at any time after my decease, with the consent in writing of my said wife, M. S., in case she shall be then living, and afterwards at and by their or his own discretion and authority, to pay and apply any part of the rents and profits of my estates, but without prejudice to the provision hereinbefore made for my said wife, or any of the annuities or legacies hereinbefore granted and bequeathed, and of the said residue of the said trust monies, stocks, funds, or securities, in placing of any of my said children in any profession, trade, business, or employment, or for his her or their maintenance or education, or reasonable advancement and preferment in the world, or for or upon any

those events shall happen after his decease ; but otherwise as soon as convenient after his decease.

In case any of the children shall be dead before attaining 21, (or being married, if daughters) the shares of those so dying to accrue to the survivors.

Power for the trustees to advance one third of the children's expectant shares for their respective maintenance, and otherwise for their benefit.

Proviso that testator's wife, whilst unmarried shall have the care of the children, during their minorities, and have a competent allowance out of the dividends for that purpose.

In case of none such children living to become entitled, then;

Upon trust to pay to each of his brother, J. S.'s children the sum of 500*l.* and to assign the residue unto his surviving brothers, in equal shares.

In case any of his brothers shall die without becoming entitled to such shares, that then the shares of those so dying shall go to their children.

other just or necessary occasion, notwithstanding his her or their estate, interest, share, or respective shares, shall not then have become vested, due, or payable, not exceeding a third of the amount of his or her presumptive or expectant interest or share, under this my will. Provided also, and I do hereby declare, that my said wife, M. S., shall, (so long only as she shall continue unmarried,) have the care, management, and bringing up of my sons during their respective minorities, or of my daughters during their minorities, or until they shall be married with such consent and approbation as aforesaid; and for that purpose, that she, my said wife, shall have, receive, and be allowed, such yearly sum or allowance out of the interest and dividends of such children's expectant shares of the said trust monies, as they, my said trustees, or the survivors or survivor of them their or his executors, administrators, or assigns shall, in their or his discretion, think fit or sufficient, any thing herein contained to the contrary thereof in anywise notwithstanding; and upon this further trust, that in case there shall not be any child or children of my body by the said M. S., living at my death, or there being such child or children, they shall all be dead before any of the said shares shall have become vested by virtue of the above dispositions, or any of them, then, and in such case, I do hereby will and direct that they, the said trustees, or the survivors or survivor of them their or his executors or administrators, shall and do stand possessed and interested of and in the said residue of the said principal monies, stocks, funds, and securities, (subject to the trusts aforesaid, or such of them as shall then be unexecuted, and capable of being carried into execution,) in trust to raise and pay thereout to each and every of the children of my brother, J. S., who shall then be living, the sum of 500*l.* of lawful money of Great Britain; and as to the remainder of such residue of the said trust monies, stocks, funds, and securities, in trust for the only benefit of my brothers, ———, and ———, their respective executors and administrators, and to be assigned and transferred to between and amongst them in equal shares, share and share alike. Provided nevertheless, and my will is, and I do hereby declare, that in case any of them, my said brothers, shall depart this life before such last event shall happen, leaving any child or children of his body him surviving, who shall be then living, then and in such case the child or children of such of them, my said brothers, so dying, shall thereupon become entitled to such part or share of the residue of the said trust monies, stocks, funds, securities

and premises, as the parent or parents of such child or children respectively would have been entitled to have received under or by virtue of the trusts aforesaid, in case he had been then living. And my will also is, and I do direct, that in case any or either of them, my said brothers, shall be dead at the time of such decease and failure of the last of my issue, without leaving any such child or children of his body him surviving, who shall be then living, that then, and in such case, the part or share, and parts or shares, of him or them so dying shall go, accrue, and belong unto the survivors or survivor, and others or other of them, my said brothers, and shall be equally divided between or amongst them, if more than one, share and share alike; and if but one, then the whole of the residue to such one survivor, his executors, administrators and assigns absolutely; any thing hereinbefore contained to the contrary thereof in anywise notwithstanding. Provided always, and I do hereby declare, that the provisions hereby made to or in trust for my said wife, are so made in lieu of, and in full satisfaction for her dower, thirds, and all other claims of in to upon or out of all or any of my estates or property. And I do further declare, that such provisions are so made and intended for her own sole and separate use, benefit, and disposal, and that the same, or any part thereof, shall in nowise be subject to the controul, debts, engagements, or incumbrances of any future husband of her my said wife; and that her receipts, notwithstanding her future coverture, shall be sufficient discharges for the same. Provided also, and I do hereby likewise declare, that such provisions are also made on the express condition that she, my said wife, shall, within one month from the time of my decease, acquit, release, and discharge my said executors, and my estate, of and from all arrears of interest, dividends and profits, which may have accrued due in my lifetime, on the sum of ——. the interests dividends and profits whereof are settled to her separate use, by our settlement made previous to our marriage, or the interests and dividends of the funds in which the same, or the produce thereof, may have been invested, and all claims and demands in respect thereof, which said trust monies were sometime past invested by the said trustees, under the said settlement, together with other monies of my own, in the purchase of, &c. Provided always, and my will and meaning is, and I do hereby declare, that it shall and may be lawful to and for the said trustees and the survivors and survivor of them, his executors and administrators, in the mean time, from and after my decease, and until the trusts hereinbefore declared of

That the provisions hereby made for the benefit of Mrs. —, are in lieu of all dower, and other claims out of his estate and property, and for her sole and separate use.

Power for the trustees to vary and alter the securities.

and concerning the said trust monies, stocks, funds, securities and premises, shall be fully executed and performed, with the consent of my said wife, M. S., during her life, to be testified in writing, under her hand, and from and after her decease, then by and of the proper authority of them, the said trustees, or the survivors or survivor of them, his executors or administrators, to sell and dispose of all or any of the stocks, funds, or securities, in or upon which all or any part of the said trust monies shall be invested, and also with such consent testified as aforesaid, or by their or his proper authority as aforesaid, as the case shall happen, to lend and place out the monies to arise by or from such sale or disposition, or any part thereof, in or upon any other of the public or parliamentary stocks or funds, or upon real or government securities, or to deposit the same for safe custody in the Bank of England ; but subject to, and so as not in any manner to affect or prejudice the trusts aforesaid, or any of them, and so from time to time to alter, change, or call in all or any such last mentioned stocks, funds, or securities, as often as they shall think fit, with such consent testified as aforesaid, or by such proper authority to be exercised in such event as aforesaid, and subject, and without prejudice as aforesaid.

Power to grant leases of the freeholds, and of the copyholds, with licence, for any term, not exceeding 21, so as the most improved rent be reserved, without taking any fine, &c.

Provided always, and I hereby declare my will to be, that it shall and may be lawful to and for the person or persons who, by virtue of the dispositions hereinbefore contained, or any of them, shall be in the actual possession of the said messuages, lands, and hereditaments, from and after he or they shall have attained the age of 21 years, and in the mean time, until he or they shall have attained that age, then for his or their guardian or guardians, by indenture or indentures, to be by him or them respectively duly executed, under his or their hand and seal, or respective hands and seals, to demise, lease, and grant all or any part of the said freehold premises, and by indenture, surrender, or otherwise to lease such of the said premises as are of copyhold or customary tenure, (so far as the licence of the lord or lords of the manor or manors, whereof the same respectively is or are parcel, or held, can be obtained for that purpose, or the custom of such manor or manors will respectively admit of,) unto any person or persons, for any term or number of years, not exceeding 21 years from the making thereof, so as there be reserved upon every such lease the best and most improved yearly rent or rents that can be reasonably obtained for the premises thereby leased, without taking any fine, premium, foregift, or forfeiture, for making the same, or any of them, and so as in every such lease there be contained a

clause of re-entry for the non-payment of the rent or rents thereby reserved, and so as the lessee in every such lease shall and do execute a counterpart thereof. Provided always, and I do hereby direct and declare, that if the said trustees or any of them, or any future trustees or trustee, under or for the purposes of this my will, shall die, or desire to be discharged from, or shall refuse to act, or become incapable of acting in the trusts of this my will, at any time or times, before such trusts shall be fully performed and executed, it shall be lawful for the trustees or trustee for the time being, with the consent and approbation of the person or persons, for the time being, in the actual possession or receipt of, or immediately interested in, and entitled to the rents and profits of the said hereditaments and premises hereinbefore devised and bequeathed, signified in writing, under his or their hand or hands; or in case the person or persons so interested and entitled shall be a minor or minors, then with the consent and approbation of his her or their guardian or guardians, signified in like manner, to nominate and appoint any other fit person or persons to be a trustee or trustees in the place and stead of him or them respectively, so dying, or desiring to be discharged from, or refusing to act, or becoming incapable of acting in the said trusts; and so in like manner, from time to time, as often as there shall be occasion, upon the death of any succeeding or future trustee or trustees, or his or their desire to be discharged from or refusing to act, or becoming incapable of acting in the said trusts; and that when and so often as any such new trustee or trustees shall be so nominated or appointed as aforesaid, the old trustee or trustees shall convey and assign the trust estates, and premises then in him or them vested, for all his or their estate and interest therein, so and in such manner as that the same may become, and be legally and effectually vested in the surviving or continuing trustees or trustee, and such new trustee or trustees jointly, or in such new trustee or trustees only, as the case shall happen, to the uses, upon the trusts, and to and for the intents and purposes, and under and subject to the provisos, declarations, and directions hereinbefore declared or expressed of or concerning the same, or such of them as shall be then subsisting, or capable of taking effect; and such new trustee or trustees shall and may act in the execution of the said trusts in such and the same manner, to all intents and purposes, and shall be invested with, and have such and the like powers and authorities, as if he or they had been originally named a trustee or trustees for such purposes by this my will. And I here-

Power for the appointment of new trustees.

Appointment  
of executors  
and guardians  
of the children.

Usual clause  
for indemnify-  
ing the trus-  
tees.

Revocation of  
all former  
wills.

by nominate and appoint the said X., Y., Z., executors of this my will. And I also appoint them, and also my said wife (so long as she shall remain unmarried,) guardians of the persons and estates of my children during their minorities. And I direct and declare that the said X., Y., Z., or any of them, or any new trustee or trustees, who shall be nominated and appointed as aforesaid, or the heirs, executors or administrators of either or any of them, shall not be answerable or accountable by virtue of, or under the trusts hereby reposed, or in pursuance hereof to be reposed in them respectively, any otherwise than each person, for his own actual receipts, acts, neglects and wilful defaults; and that they, or either or any of them, shall and may, by or out of any monies which shall come to their hands respectively by virtue of this my will, defray and retain to and reimburse themselves and each other, all such costs, charges and expenses as they respectively shall or may incur, pay or sustain, in or about the execution, or by means of the trusts hereby in them reposed; and I hereby revoke all former wills and codicils thereto by me made at any time heretofore, and declare this only to be my last will, as expressed and contained in this and the six preceding sheets of paper hereto annexed.

In witness, &c.

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No. 8.

*Will consisting exclusively of Provisions for Wife and younger Children, by annuity, and portions charged upon all the Testator's property.*

Testator gives  
his house at  
— after his  
wife's death,  
and all other  
his freehold,  
leasehold, and  
copyhold  
estates, im-  
mediately on  
his decease,  
his contracts

THIS is the last will and testament of me, J. H., of, &c. I give and devise all that my freehold messuage or dwelling-house; known by the name of S—, and all my estate and lands thereunto belonging or therewith occupied, situate at —, unto my said wife, for and during the term of her natural life; and from and immediately after her decease I give and devise my said messuage or dwelling-house, estate and lands at —, and from and immediately after my decease,



I give and devise all other my freehold and all my copyhold or customary and leasehold messuages, lands, tenements and hereditaments whatsoever and wheresoever, and all my equitable and other estate and interest in the contracts which I have entered into for the purchase of land-tax charged upon and payable for my said estate; and also all shares and promissory notes, in or from the Grand Junction Canal navigation, of which I shall be possessed at my death; and all the share or shares, estate and interest which I have of and in the trade or business of ———, which I now carry on in partnership with ——— and ———, and all my books, pictures, plate, linen, china, household goods and household furniture of every kind which shall be in or about both my dwelling-houses, the usual places of my residence in town and country, at the time of my decease; and also all my stocks, monies, securities for money, and all other my personal estate not hereinbefore disposed of, unto and to the use of my said sons, J. H., T. O., and W. R., their heirs, executors, administrators and assigns respectively, for all such estate, term and interest as I shall have therein respectively, at my decease, and according to the several natures and qualities of such estates and property respectively, upon the trusts hereinafter mentioned, expressed and declared of and concerning the same, (that is to say,) as for and concerning the books, pictures, plate, linen, china, household goods, and household furniture of every kind, which shall be in both my said dwelling-houses, the usual places of my residence in town and country, at the time of my decease, upon trust, from and after my decease, to allow my said wife to have and enjoy the use thereof during her life, for her own absolute benefit, without any controul whatsoever; and my will is, and I do hereby order and direct that as soon as conveniently may be after my decease, my said trustees do cause a true and exact inventory to be made and taken of all the said books, pictures, plate, linen, china, household goods and household furniture, and two copies to be made of such inventory, one to be delivered to my said wife, and the other to be kept by my said trustees, which last copy shall be signed by my said wife, at the foot of a receipt thereunder written, for the articles therein specified, at or before the time of her taking possession thereof; and I declare and direct that my said sons, J. H., T. O., and W. R., their heirs, executors, administrators and assigns shall stand and be seised and possessed of and interested in my said estate at ———, and the said books, pictures, plate, linen, china, household goods and household furniture, subject to the life

for land-tax and canal shares, partnership share in his business of a ——— books, pictures, plate, linen, china, household goods, and also his stocks, money, securities for money, and all other his personal estate, to his trustees, upon trust,

to allow his wife to have the use of the books, furniture, &c. for her life, with directions for an inventory.

Trustees out of the devised premises to raise 8000*l.* for children's portions (except the eldest son).



estate and interest of my said wife therein, and all other my said freehold, copyhold and leasehold estates, shares in the Grand Junction Canal navigation, and personal estate whatsoever hereinbefore devised and bequeathed to them upon trust, by and out of the rents and annual income of my said freehold, copyhold and leasehold estates, or by mortgage and sale thereof, or of any part thereof, or by all or any of the same means, or by and out of the annual produce of my said personal estate, or by sale or other disposition thereof, or of any part thereof, or by such other ways and means as they shall think fit and advisable, to raise and levy the sum of 8000*l.* for the benefit and for the portions of all and every my child and children, living at my decease, or born afterwards (other than and except my eldest son the said J. H.) equally to be divided between and amongst, or for the benefit of them, if more than one, share and share alike; and if there shall be but one such child, then for the benefit of such only child, and to be raised and paid to or for such children or child, in the manner following, (that is to say) the share or respective shares of such of them, as being a daughter or daughters, shall be under the age of 21 years, and unmarried at the time of my decease, to be raised and paid as and when she or they shall respectively attain that age or marry with the consent of, &c. hereinafter named, which shall first happen, and to be paid or invested in manner hereinafter mentioned, to the intent that the income thereof may be for the sole and separate use of such daughter or daughters, and may not be subject to the debts, control or engagements of any person, with whom she or they may, after my decease, happen to intermarry, and that the principal may be subject to the respective testamentary appointments, as hereinafter is mentioned; and the share or respective shares of such of them respectively, as being a son or sons, shall be under the age of 21 years, at my decease, to be raised and paid as and when he or they respectively shall attain that age; unless such time or respective times of marriage or attaining such age shall happen in my life-time; and in such case the share or shares of such of them as being a daughter or daughters shall attain the age of 21 years, or marry during my life-time; or being a son or sons, shall attain the age of 21 years, during my life, shall be as a vested interest for his her or their benefit respectively, upon my decease, and be raised and payable in manner aforesaid, at the end of six calendar months next after my decease, with interest thereon from my decease, until actual payment thereof; and if any such child or children, being a daughter or

daughters, shall die under the age of 21 years, and without having been married, or being a son or sons, shall die under that age, then, as well the original as every other share which he, she or they, so dying, shall have taken by way of survivorship or accruer, shall go and be raised and paid and payable to or for the benefit of the survivor and survivors, and others or other of them, together with my eldest son, at such time or times as his her or their original share or shares shall become payable, or as soon afterwards as circumstances will permit, but so as that in making such division of all such surviving or accruing shares, my eldest son and his executors or administrators shall be included, and shall have and be entitled to one equal share and proportion therein with the other children or their respective executors or administrators; and it is my will and mind, and I do hereby declare that all and every the share or shares so directed to survive and accrue, shall from time to time survive and accrue, together with the original share and shares, until such original share or shares shall, by virtue of this my will, become payable; and in case there shall be no such child or children, who, being a daughter or daughters, shall live to attain the age of 21 years, or be married, or being a younger son or sons shall attain the age of 21 years, then my will and mind is, and I do hereby direct that the said sum of 8000*l.* or any part thereof, shall not be raised, and that the said trusts hereinbefore contained in that behalf shall cease and determine, and all and every part of my real and personal estate be as fully and effectually discharged therefrom as if the same trusts had never been declared. And subject to the several trusts hereinbefore declared, I direct that my said sons, J. H., T. O., and W. R., their heirs, executors, administrators and assigns, shall stand seised and be possessed of and interested in my said real estate, and my said residuary personal estate, upon trust, by and out of the rents, issues and annual produce thereof, or by mortgage, sale, or other disposition thereof, or of any part thereof, or by all or any of the same means, or by such other way and means as they shall think fit and most advisable, to raise and levy yearly and every year one annuity or yearly sum of 365*l.* free from taxes, and clear of all other deductions whatsoever, and pay the same into the proper hands of my said wife, or into the hands of such person or persons as she by any note or writing under her hand shall, from time to time, but not by way of anticipation, charge, or assignment, appoint to receive the same during her life, to the intent that the same may be for the sole and separate use of my said wife,

cluding the eldest son.

If children all die before the vesting of their shares, the money not to be raised.

Annuity to the wife.

And subject to the aforesaid payments in trust to pay to testator's son, J. H., all the rents, profits, and annual produce of the real and personal estates for his life, and after his decease, in trust for his children according to his appointment.

and may not be subject to the debts, control, disposition or engagement of any person with whom she may happen to intermarry, the same annuity to be paid and payable by four equal quarterly payments, on four days or times in every year, the first quarterly payment thereof to begin and be made at the end of three calendar months next after my decease. And upon further trust, that they my said trustees respectively do and shall by all or any of the ways and means aforesaid raise, levy and pay to the executors or administrators of my said wife, a proportionable part of the said annuity of 365*l.* calculated to the day of the decease of my said wife, for and in respect of the incurring quarter of a year, wherein she my said wife may happen to die. And I further direct that the receipt or receipts of my said wife, or of her appointee or appointees, and her or their receipt or receipts only, shall be a good and sufficient discharge or discharges, to the person or persons paying the said annuity, for so much thereof as in such receipt or receipts shall be acknowledged or expressed to be received; and subject to the trusts hereinbefore declared for my said wife's benefit during her life, and subject to the payment of the said sum of 8000*l.* thereinbefore directed to be raised for portions for my younger children, and to every estate, trust, and interest hereinbefore mentioned, and all powers, provisos and directions in this my will contained respecting my said real estate, and my said residuary personal estate, I declare and direct that my said sons J. H., T. O., and W. R., their heirs, executors, administrators and assigns respectively shall stand seised, and be possessed of, and interested in all my said real and all my said residuary personal estate whatsoever in trust to pay to, or permit and suffer, or well and sufficiently to authorize and empower my said son J. H. and his assigns to receive and take the interest dividends and annual produce, and the rents issues and annual income of the same real and personal estate for and during the term of his natural life; and from and after his decease, in trust for all and every or such one or more of the children of my said son J. H. lawfully to be begotten, whether born in his lifetime or after his decease at such time or times and in such parts shares and proportions, and subject to such conditions restrictions and limitations over to or for the benefit of all or any of such children as he my said son J. H. from time to time by any deed or deeds writing or writings with or without power of revocation to be by him sealed and delivered in the presence of and to be attested by two or more credible witnesses, or

by his last will and testament in writing, or any codicil or codicils thereto, or any writing purporting to be his last will and testament or codicil to be signed and published by him in the presence of and to be attested by three credible witnesses, shall direct or appoint; and in default of and in the mean time and until such direction or appointment shall be made, and as to so much and such part or parts thereof, whereof no such direction or appointment shall happen to be made, and also subject to such direction or appointment where the same shall happen not to be a complete and entire appointment of the whole interest and property therein, as to for and concerning all my said freehold copyhold and leasehold messuages, lands, tenements and hereditaments, in trust for all and every the child and children of my said son J. H. lawfully to be begotten in equal shares, if more than one, as tenants in common and not as joint tenants, and for their respective heirs, executors, and administrators for ever; and if any such child or children shall die under the age of 21 years, then as well the original share of him her or them so dying, as all such other share or shares as shall survive to him her or them on the death of any others or other of the said children under the said age of 21 years shall be in trust for the survivors or survivor and others or other of them in equal shares if more than one as tenants in common, and not as joint tenants, and for their respective heirs, executors, administrators and assigns for ever; and in case there shall be no child or children of my said son J. H., or being such, all of them shall die under the age of 21 years, then my said freehold, copyhold, and leasehold messuages, lands, tenements, and hereditaments, or so much thereof whereof there shall have been no such direction or appointment as aforesaid, shall be in trust for all and every my said daughters and younger sons and other child and children begotten or to be begotten, and whether born in my lifetime or after my decease in equal shares if more than one, as tenants in common, and not as joint tenants, and for their respective heirs, executors, administrators and assigns for ever; and if any such child or children shall die under the age of 21 years, then as well the original share of him her or them so dying, as all such other share or shares as shall survive to him her or them on the death of any others or other of the same children under the said age of 21 years shall be in trust for the survivors or survivor and others or other of them in equal shares if more than one, as tenants in common, and not as joint tenants, and for their respective heirs, executors,

And in default of appointment, then as to the messuages, lands, and tenements to and amongst the children of J. H., in equal proportions with survivorship.

And in default of such children of testator's son, J. H., then to and amongst testator's younger children in equal shares, with survivorship.

And as to the monies, stocks, and residuary personal estate to and amongst the children of J. H., equally, with survivorship.

And in default of such children of J. H., then to and amongst testator's younger children, in like manner as the 8000*l.* was directed to go and be divided.

administrators and assigns; and from and after the death of my said son J. H. as to for and concerning all and singular my monies, stocks, funds, securities, and residuary personal estate whatsoever subject as aforesaid, in trust for all and every the child and children of my said son J. H. lawfully to be begotten equally to be divided between and amongst them if more than one, share and share alike; and if there shall be but one such child then for such only child; and if any such child or children being a daughter or daughters shall die under the age of 21 years and without having been married, or being a son or sons shall die under that age, then the part or share parts or shares of him her or them so dying shall go and be transferred to the survivors or survivor of them, and the executors, administrators and assigns of such of them being dead, who being a daughter or daughters shall have attained the age of 21 years, or been married, or being a son or sons, shall have attained the age of 21 years, at such time or times as his her or their original share or shares shall become transferable, or as soon afterwards as circumstances will permit; and my mind is, and I declare that all and every the share or shares so directed to survive and accrue shall from time to time survive and accrue together with the original share and shares until such original share and shares shall by virtue of this my will become vested; and in case there shall be no such child or children of my said son J. H. who being a daughter or daughters shall attain the age of 21 years, or be married, or being a son or sons shall attain the age of 21 years, then my will and mind is, and I do hereby declare that my said trustees and their executors administrators and assigns shall stand and be possessed of and interested in all and singular the same monies, stocks, funds, securities, and residuary personal estate whatsoever upon the same trusts and to and for the same ends, intents, and purposes as are hereinbefore expressed and directed concerning the said sum of 8000*l.* directed to be raised as portions for my said daughters and younger sons as aforesaid, or such of them as shall be then subsisting and capable of taking effect, and to be payable and transferable for the sole benefit and separate use of my daughters in like manner as their said portions in the said sum of 8000*l.* Provided always, and my will is, and I do hereby direct that in case my said son J. H. or his assigns shall punctually pay the said sum of 8000*l.* as portions for my younger children when and as the same portions shall respectively become payable under the directions of this my will, and every part

thereof, and the interest monies hereinafter directed to be paid in respect of the same, and also the said annuity of 365*l.* to my said wife for her life and every part thereof at the times and in the manner hereinbefore mentioned; and until default shall be made in some of the same payments the trustees for the time being of this my will shall from time to time, and at all times permit and suffer or allow my said son J. H. and his assigns during his life to receive and take the rents, issues, and annual produce and income of my said real and personal estate, and of every part thereof (subject as hereinbefore mentioned) to and for his and their own absolute use and benefit without any hindrance, interruption, or disturbance whatsoever; and in case my said son J. H. shall with his own monies pay or advance the whole or any part of the principal of the said sum of 8000*l.*, then and in such case, and to that extent he shall be and remain a creditor upon the real and personal fund hereinbefore made liable to the raising and payment thereof, and he or his executors administrators or assigns shall and may have the amount of the principal so to be advanced by him raised and levied by the ways and means aforesaid by and out of the said real and personal fund to and for his and their own use and benefit together with interest thereof from the time of his death, if the same shall not have been before raised after the rate of 5*l.* per centum per annum. Provided also, and I direct that from and after my decease, interest money at the rate of 3 pounds for one hundred pounds for a year upon such of the respective portions of my said daughters and younger sons of and in the said sum of 8000*l.* thereinbefore provided for them as shall not at the time of my decease be payable by virtue of this my will shall be paid by my said son J. H. or his assigns during his life, and after his death by the person or persons entitled to the fund subjected to the payment thereof; and in default of the regular payment thereof, shall be raised and paid by the said trustees for the time being, by and out of the rents, issues, and annual produce of my said real and personal estate, or by mortgage, sale, or other disposition of the whole or a sufficient part thereof until the same portions shall respectively become payable under the directions of this my will, or until the death of my said wife, which of the events shall first happen, the same interest money or a sufficient part thereof to be paid into the hands of my said wife for the maintenance, education, and support of such of my said daughters and younger sons to whom the same portions shall belong during the term of her

Testator's son, J. H., to enjoy the produce of the estates, on his paying the above charges and sums.

Such son, upon his paying the 8000*l.* to become a creditor to the estate for the same.

Interest to be 3 per cent, upon the portions.



Interest on the portions till payable.

To be applied for maintenance, &c.

The residue to accumulate.

Part of the portions to be applied, if necessary, in and towards the advancement in the world of any of the younger children.

The portions of the daughters to be for their separate use, and not to be charged or anticipated by them.

natural life, and from and after the decease of my said wife, interest after the rate of 5*l.* for one hundred pounds for a year upon such of the same respective portions, as well original as accruing, as shall not at my death be payable, shall be paid by my said son J. H. or his assigns during his life, and after his death by such other person or persons as aforesaid; and in default of such payment by my son or such person or persons as aforesaid, the same shall be raised and paid by the trustees for the time being of this my will by the means aforesaid until the same portions shall respectively become payable; and the whole, or a sufficient part thereof, shall be applied by the same trustees for the maintenance, education, and support of such of my said daughters and younger sons respectively to whom the same portions shall belong. And I direct that the residue (if any) of such interest money after maintaining and educating my said daughters and younger sons as well during the life of my said wife as afterwards, and until their said portions shall respectively become payable in manner aforesaid, shall be placed out or invested in or upon government or real securities, from time to time to accumulate, and that such accumulation shall go along with the principal portions from whence the same shall arise. And it is my will, and I hereby declare and direct that it shall and may be lawful for the major part of the trustees of this my will for the time being when and so often as they shall think necessary, to raise and advance by and out of the rents, issues, and annual produce and income of my said real and personal estate, or by mortgage or sale thereof, or by all or any of the same ways and means, or by such other ways and means as they shall think proper, any sum or sums of money for the purpose of apprenticing, placing out, or other advancement of any one or more of my said younger sons during his or their minority, not exceeding the sum of 300*l.* for each son, the same sum and sums of money to be taken and considered as and in part of the portion or share or respective portions or shares, as well original as accruing, of such son and sons for whom the same monies shall be so advanced, of and in the said sum of 8000*l.* hereinbefore directed to be raised for the benefit of my daughters and younger sons as aforesaid; and I direct that my said trustees and their executors administrators and assigns shall stand and be possessed of and interested in such portion or portions, as well original as accruing, as is or are hereinbefore provided for such of my younger children as shall be a daughter or daughters by and out of the said sum of 8000*l.* when and as



the same shall be paid and payable, upon trust to place out or invest such sum or sums of money in or upon government or real securities at interest; and from time to time to alter vary and transpose such securities and funds, and to stand and be possessed of and interested in the money so to be placed out in trust to pay the interest, dividends, and annual produce thereof into the proper hands of such daughter or daughters according to her or their share or respective shares and interests therein, or into the hands of such person or persons as she or they by any note or writing under her or their hand or hands shall from time to time, but not by way of anticipation, charge, or assignment, appoint to receive the same, during the life or respective lives of such daughter or daughters, to the intent that the same may be for her or their sole and separate use, and may not be subject to the debts, controul, disposition, or engagements of any present or future husband or husbands of such daughter or daughters; and from and after the decease of such daughter or daughters respectively upon such trusts and to and for such intents and purposes, and under and subject to such powers, provisos, and declarations as such daughter or daughters respectively, notwithstanding her or their coverture, by her or their will or respective wills, or any writing or writings purporting to be such will or wills, or any codicil or codicils to be signed and published in the presence of, and to be attested by two or more credible witnesses, shall direct or appoint; and in default of, and in the mean time, until some such direction or appointment shall be made, and as to so much, and such part or parts thereof, whereof no such direction or appointment shall be made, or where the same shall not be a complete and entire appointment of the whole interest and property therein, in trust for such person or persons of the blood and kindred of such daughter or daughters living at the time of the decease of such daughter or daughters respectively, as would by virtue of the statutes of distribution have become entitled to the same. And my will is, and I further direct that in case my said son I. H. or his assigns shall happen to make default in payment of the portions hereinbefore provided for my younger sons and daughters, or of any part of the same, or in payment of the annuity of 365*l.* to my said wife or any other sum or sums of money herein directed to be paid, when and as the same monies shall respectively become payable by virtue of this my will, and my said trustees shall, in pursuance of my directions for that purpose given, by mortgage, sale, or other disposition of all or any part of my said real and personal es-

If upon default in payment of the portions the money raised by mortgage, &c. shall be more than the sum wanted, the overplus to be invested upon the same trusts as before mentioned concerning the settled estates.

Trustees to re-  
new leases.

Debts and fu-  
neral expenses.

Power to the  
trustees to  
compound  
debts, &c.

tate, happen to raise and levy more money than will be sufficient to pay such sum or sums of money upon such default as aforesaid, then the residue of the money so raised and remaining in hand after application of a sufficient part thereof for the purposes of this my will, shall be placed out upon government or real securities at interest in the names of my said trustees, who shall stand and be possessed of such securities upon the same trusts, and to and for the same intents and purposes, and under and subject to the same powers as are herein expressed, declared, and contained of and concerning my real and personal estate or such of them as shall be then subsisting and capable of taking effect, regard being had to the nature of the fund from whence the monies so to be invested in securities shall respectively arise. And I do hereby authorize, empower, and direct the trustees for the time being of this my will from time to time as occasion shall require, and as they shall think proper, during the continuance of the trusts by me herein declared of and concerning my said leasehold premises, to apply for, and do their endeavours to renew the leases or respective leases of the same premises, the costs and charges of all which renewals I do hereby charge on the whole of my real and personal estate so hereby devised and bequeathed to my said trustees as aforesaid; and I do order and direct that all new leases to be obtained of the same leasehold premises shall be and be declared to be on the like trusts, and subject to the like powers, provisos, and directions as are herein declared of and concerning the now subsisting lease or leases of the same premises, or such of the same trusts as shall be then subsisting. I direct that all my just debts, testamentary and funeral expenses shall be paid by my executors and executrix as soon as conveniently may be after my decease; and I declare that it shall and may be lawful for my said son J. H., T. O., and W. R., and my said wife M. H. and the trustees to be appointed as hereinafter mentioned, or the major part of them for the time being, from time to time to agree and compound with any person or persons who at or after my decease shall be debtors, accountants to, or who shall appear or pretend to be creditors or demandants upon my estate and effects, or upon my trustees or executors and executrix in respect thereof, in all cases where the same in the judgment of my said trustees and executors and executrix, or the major part of them, shall seem necessary or reasonable, and to take such part as can be gotten in full discharge of all such debts, and also to give such consideration as will be accepted in full

discharge of all such demands, as shall be thought most advantageous for my estate and the persons interested therein. And my will further is, and I hereby declare that my said trustees respectively, shall from time to time and at all times have full power by indenture or indentures under their respective hands and seals, to demise, lease, and grant my said freehold, copyhold, and leasehold premises or any part or parts thereof unto any person or persons for any term or number of years not exceeding 21 years, to take effect in possession and not in reversion or by way of future interest, so as upon all such leases there be reserved to continue payable quarterly or half-yearly, during the term thereby to be granted, the best and most improved yearly rent or rents that can be reasonably had or got for the same without taxing any fine, premium, or foregift, and so as in all such leases there be contained conditions for re-entry for non-payment of the rent, and so as no clause be contained in any of the said leases giving power to any lessee to commit waste, and the respective lessees execute counterparts of all such leases, and the leases of the said copyhold parts of the said premises be made according to the custom or customs of the manor or manors whereof the same are holden, and the leases of the leasehold parts of the said premises be made to determine before determination of the terms or interest of my said trustees therein. **Leasing power.**

Provided also, and I declare and direct if my said son J. H. and the said T. O. and W. R. or any two of them, or two of any future trustees to be appointed as hereafter is mentioned, shall die or be desirous of being discharged of and from, or refuse or decline to act or become incapable of acting in the trusts hereby in them reposed as aforesaid, before the said trusts shall be fully performed or discharged, then and in such case, and when and as often as the same shall happen, it shall and may be lawful for the trustees so declining to act, or the executors or administrators of such of them so dying; by any writing or writings sealed and delivered by them, and to be attested by two or more credible witnesses from time to time to nominate substitute or appoint any other persons to be trustees in the stead or place of the trustees so dying or desiring to be discharged, or refusing or declining to act, or becoming incapable of acting as aforesaid, so that there be at all times three acting trustees of this my will until the trusts thereof shall be fully completed; and in default of such appointment it shall be lawful for my younger children, or any of them, in like manner to appoint such new trustees, and **Clause for changing trustees.**

which I hereby direct to be done accordingly, and that my will may be strictly complied with in this my request; and I direct that when and as often as any new trustees shall be nominated and appointed as aforesaid, all the said trust estates, monies, securities, and funds shall be thereupon with all convenient speed conveyed, assigned, and transferred in such manner, and so as that the same shall and may be legally and effectually vested in the surviving or continuing trustees of the same trust estates, monies, and premises, and such new trustees jointly, or if there shall be no such continuing trustees, then in such new trustees wholly, to for and upon such and the same trusts intents and purposes as are hereinbefore declared or expressed of and concerning the said trust estates, securities, monies, and premises as aforesaid, or such of them as shall be then subsisting and capable of taking effect; and that all such new trustees shall and may in all things act and assist in the management and carrying on and execution of the trusts to which they shall be so appointed, as fully and effectually, to all intents, effects, constructions, and purposes whatsoever, and shall have and be considered as invested with such and the same powers and authorities as if they had been originally in and by this my will nominated trustees for the purposes for which such new trustees shall be appointed, any thing hereinbefore contained to the contrary hereof in anywise notwithstanding. And I appoint my said wife during her widowhood guardian of all my infant children living at my death, or born afterwards, until the sons shall attain the age of 21 years and the daughters shall attain that age or be married; and after the decease or second marriage of my said wife which shall first happen, I appoint the said T. O. and W. R. and the survivors and survivor of them guardians and guardian of my said infant children as aforesaid; and I appoint my said son J. H. and the said T. O. and W. R. and my said wife executors and executrix of this my will. I give to each of them the said T. O. and W. R. the sum of 100*l.* on condition of their respectively acting in the trusts and execution of this my will, but not otherwise; and I give to my said son J. H. and the said T. O. and W. R. their heirs and assigns all such real estates as are now vested in me by way of mortgage in order to enable them with the greater ease and convenience to recover, receive, and get in the money secured by such mortgages for the purposes of this my will; and I give to my said son J. H., T. O., and W. R., all such real estates as are now vested in me upon any trust or trusts, to hold the same to my

Devise of the mortgage and trust estates of the testator to the trustees to get in the mortgage debts, and to hold the trust estates upon the trusts affecting the same.

said son J. H., T. O., and W. R., their heirs and assigns upon the trusts affecting the same. Provided always, and it is my will and mind, and I do hereby declare that it shall and may be lawful to and for my said son J. H., T. O., and W. R., and all future trustees to be appointed as hereinbefore mentioned, their and every of their executors and administrators, by and out of all or any of the monies which by virtue of this my will shall come to their or any of their hands, to deduct, retain to, and reimburse themselves and himself, and to pay or allow to his and their co-executors, co-executrix, and co-trustees or co-trustee all such costs, charges, and expenses as they respectively shall and may sustain, expend, or be put unto, in or about the execution of this my will, or any of the trusts herein contained; and also that they and their respective executors and administrators shall be charged and chargeable, every of them only for and with his and their own respective receipts, payments, acts, and wilful defaults, and not otherwise, and shall not be charged or chargeable with or for any sum of money other than such as shall actually and respectively come to his or their hands by virtue of this my will, nor with or for any loss or damage which may happen in or about the execution thereof, or any of the trusts hereby declared, without his or their wilful default respectively. In witness whereof I the said J. H. the elder have to this my last will and testament contained in eleven sheets of paper set my hand to the first ten sheets, and my hand and seal to this last sheet the 20th day of April in the year of our Lord 1805.

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## No. 9.

*A Will chiefly settling renewable leases upon collateral relations; with other dispositions of personal estate.*

THIS is the last will and testament of me L. F., of ———  
Whereas, under the will of ———, deceased, I am entitled in expectancy, on the death of the survivor of ———, and ———, to the absolute interest of, and in divers lands, tithes, and other hereditaments, situate, lying, arising, and

Devise of all  
the personal  
estate to trus-  
tees.

Out of the  
rents and pro-  
fits to set apart  
a sufficient sum  
to pay the rents  
reserved on the  
original leases,  
and also the  
expenses of  
the renewals.

being in the several parishes of ———, and ———, and elsewhere in the county of ———, and held by and under certain leases for years, renewable, under the dean and chapter of ———. And whereas I am also entitled, under and by virtue of an indenture of settlement, bearing date the 20th day of October, 1804, in the event of my surviving ———, to certain monies, stocks, funds and securities, which have arisen from the sale of ———, in the county of ———, and which are vested in the names of the trustees, named and appointed in and by the said indenture of settlement. I do hereby give, devise, and bequeath all the said leasehold estates, monies, stocks, funds, securities, and premises, to which I am so entitled in reversion or expectancy as aforesaid, and subject to the said lives and events respectively, hereinbefore mentioned, and all other my estate, property and effects, real and personal, and of what nature and kind soever, and wheresoever situate, subject to the payment of my just debts, funeral and testamentary expenses, unto and to the use of A. B. C., upon the trusts hereinafter expressed and declared of and concerning the same respectively, (that is to say) upon trust that my said trustees, and the survivors and survivor of them, his heirs, executors, or administrators, do by and out of the rents and profits of my said leasehold estates and premises, raise and lay apart such annual sum as they may deem sufficient for paying the rents, and performing the covenants reserved and contained by and in the original and subsisting leases thereof, as long as the said trusts hereby in them reposed, or any of them, shall remain to be performed; and do also by and out of such rents and profits of my said leasehold estates, set apart such sum of money annually, as they shall, in their judgment and discretion, deem sufficient to renew the leases of the same premises, and take new leases thereof respectively in their own names, when, and as it shall be usual and requisite; and also from time to time make such proper surrenders of the leases subsisting, as shall be requisite or necessary, or incident to such renewals, and also do and shall, by and out of the rents and profits of the said leasehold estates, and such annual or other sums so set apart as aforesaid, pay and discharge the fines and fees which shall or may be duly demandable and payable upon such renewals; all which renewed leases shall be vested in them the said trustees, for the time being, upon the same trusts, and for the same intents and purposes, and with under and subject to the same powers, provisos, limitations and declarations, as are contained and referred to in this will, concerning the present



subsisting leases, or any of them. And I do hereby also empower and direct my said trustees for the time being, during the time aforesaid, out of such rents and profits of the said leasehold estates and premises as aforesaid, to discharge and defray all such expenses as may be incident to, and incurred in the proper management of the said leasehold premises, or in receiving and recovering the rents thereof; and subject to such expenditure and disbursements, do and shall, out of such rents and profits of the said leasehold estate, pay and discharge the several annuities, or clear yearly sums following (that is to say) to ———, if he shall survive me, the clear yearly sum of 400*l.* for and during the term of his life; to my brother, O. F., the clear yearly sum of 300*l.* for and during his life; to ———, the clear yearly sum of 60*l.* for and during his life; to ———, the clear yearly sum of 40*l.* for and during his life; to ———, the clear yearly sum of 100*l.* for and during her life; to ———, the clear yearly sum of 50*l.* for her life: the said several annuities of 400*l.*, 300*l.*, 60*l.*, 40*l.*, 100*l.*, and 50*l.*, to be paid quarterly, by equal payments in every year, and a proportionate part of such quarterly payment (if any) as shall be accruing, and not have actually accrued due at the time of the decease of each of the said several annuitants respectively, the first payment of each of the said sums to begin and be made at the expiration of three months after my decease; and subject to the several aforesaid annuities, payments and provisions, I will and direct that my said trustees for the time being do and shall stand and be possessed of all the said last mentioned leasehold estates and premises, so to them devised and bequeathed as aforesaid, upon trust, to pay to or empower my brother, M. F., and his assigns to receive, the rents and profits, interest, dividends, and annual proceeds of the same respectively, for his and their own absolute use and benefit, for and during the term of his life; and from and after the decease of my said brother, M. F., do and shall stand and be possessed of and interested in the said leasehold estates and premises subject as aforesaid, in trust for the first son of my said brother, M. F., of his body lawfully begotten, his heirs, executors, administrators and assigns; but nevertheless, in case such first son shall happen to die before he shall have attained the age of 21, and without lawful issue of his body begotten, then do and shall stand and be possessed of and interested in the same premises, in trust for the second son of my said brother, M. F., his heirs, executors, administrators and assigns; and in case such second son of my said brother shall happen to die before he shall have attained the

And to defray the expenses of management. And, subject to such payments and disbursements, to pay annuities.

To pay to or empower testator's brother to receive the rents and profits for his life.

Trusts for unborn children with executory trusts over upon their dying before 21.



said age of 21, and without lawful issue of his body begotten, then in trust for the third and every other son and sons of my said brother, M. F., in like manner successively, according to the order of their birth, with like limitations over in the event of their respectively dying before 21, and without lawful issue as aforesaid; and in case there shall be no son of my said brother, M. F., lawfully begotten, living at his death, or there being any such, they shall all die before they shall attain the age of 21, and without lawful issue as aforesaid, then in trust for all and every the daughter and daughters of the body of the said M. F., lawfully begotten, his and their heirs, executors, administrators and assigns, to be equally divided between and among them, if more than one, as tenants in common; and in case there shall be more than one, and any one of them shall die under the age of 21, and without having been married, then in trust for the survivors or survivor, others or other of them, their or her heirs, executors, administrators and assigns, with like remainders over, in every like event of the death or deaths of any one or more of the surviving daughters under age and unmarried, to and amongst the survivors or survivor, others or other of the said daughters, such survivorship and accruer to extend in every such case, as well to the surviving as to the original shares; and if there shall be no such daughters or daughter, or none that shall live to be married, or to attain the age of 21, then as to the said leasehold estates and premises, subject as aforesaid, in trust for my brother, N. F., for his life, with remainders to his first and other sons successively, and to his daughters after them, as tenants in common with and subject to the same conditional limitations and devises over to and amongst them respectively, as are hereinbefore contained, limited and provided, with respect to the sons and daughters of my said brother, M. F.; provided nevertheless, and my will is, that in the event of the decease of my said brother, M. F., without leaving issue of his body lawfully begotten, or leaving such issue, and the sons (if any) shall all die before the age of 21, and without leaving issue as aforesaid, and the daughters (if any) shall all die before such age, and before any of them shall have been married as aforesaid, so as to give effect to the conditional devise or limitation over to the said N. F., and his family, the said annuity of 300*l.* hereinbefore directed to be paid to the said O. F. shall cease to be payable, and instead thereof the annual sum of 500*l.* shall be paid to him and his assigns for and during the remainder of his natural life; and in case my said brother, N. F., shall die without leaving any

children of his body, lawfully begotten, or there being such, all of them shall die, the sons (if any) before the age of 21, and without leaving issue as aforesaid, and the daughters (if any) before that age, and before any of them shall have been married as aforesaid, then as to the said leasehold estates and premises, and subject as aforesaid, in trust for my said brother, O. F., for his life, with remainders to his first and other sons successively, and to his daughters after them, as tenants in common, with and subject to the same conditional limitations and devises over to and amongst them respectively, as are hereinbefore contained, limited, and provided, with respect to the sons and daughters of my said brothers, M. F. and N. F., as aforesaid. But in the event of such succession of my said brother, O. F., and his family to the beneficial interest in my said leasehold estates, under the said last mentioned disposition, my will is, that the annuity of 100*l.* hereinbefore by me directed to be paid to ———, do cease to be payable, and that instead thereof an annuity of 200*l.* to be paid to her, and her assigns, for and during the remainder of her natural life. Provided always, and my will further is, that in case it shall so happen that my said brother, M. F., shall become entitled to the beneficial interest of and in the trust property contained in and settled by said indenture of the 20th day of October, 1804, under the limitations and provisions therein contained, or any of them, the said O. F. shall be entitled to receive out of the rents and profits of the said leasehold estates and premises, hereinbefore by me devised and bequeathed in trust as aforesaid, in lieu of the said annuity of 300*l.* the annual sum of 500*l.*, for and during the remainder of his natural life; and in case of the deaths of my said brothers, M. F., N. F., and O. F., without leaving any such children of any of their bodies respectively, as aforesaid, or any that shall live to the age of 21 years, or have issue of their body or bodies, if a son or sons, or be married, if a daughter or daughters, then my will is, that my said trustees for the time being do and shall stand and be possessed of and interested in all my said leasehold estates and premises, late the property of ———, so devised and bequeathed to them in trust, as aforesaid, subject to the several annuities, and other charges, in trust for ———, for the term of his life; and from and immediately after his decease, upon the trusts, and for the several ends intents and purposes hereinafter more particularly mentioned, touching the ultimate residue of my general personal estate. And as to, for, and concerning so much, and such part of my estate and

The estates and interests to shift on certain events.

If all the brothers die without issue living to acquire vested estates, then in trust for ——— for his life, remainder to the uses, &c. after limited and expressed with respect to the ultimate residue.

Concerning the residue of the personal estate

to convert the same into money and invest it in the funds.

Testator then settles the same in the same way as his before-mentioned leasehold estates.

effects as I shall become entitled to under and by virtue of the said indenture of the 20th of October, 1804, in the event of my surviving ———, and all other my estate and effects, whatsoever and wheresoever; I direct the said, &c. and the survivors and survivor of them, his executors administrators and assigns to stand possessed thereof, upon trust, as to such part and parts thereof, as may not, at the time of my decease, consist of stock in the public funds, to collect get in and convert the same into money, and then to lay out and invest such money in some or one of the public funds and parliamentary stocks of Great Britain, in their own names; and as to such stocks, funds and securities, and also as to all other my property, estate and effects so devised and bequeathed to them as aforesaid, except the said leasehold property and estates which I have by this my will hereinbefore disposed of, to pay to or permit my said brother M. F. and his assigns, to receive the dividends, interest, and annual produce thereof, for his life, with remainders to his first and other sons successively, and to his daughters after them, as tenants in common, with and subject to the same conditional limitations and devises over, to and amongst them respectively, as are hereinbefore contained, limited and provided, with respect to the sons and daughters of my said brother, touching the leasehold estates in the county of ———, hereinbefore devised by my said will; and in case my said brother M. F. shall die without leaving any children of his body lawfully begotten, or, there being such, all such as shall be sons shall die under 21, and without issue as aforesaid, and all such as shall be daughters shall die before that age and before any of them shall have been married as aforesaid, then subject as aforesaid, in trust for my said brother N. F. for his life, with remainders to his first and other sons successively, and to his daughters after them, as tenants in common, with and subject to the same conditional limitations and devises over, to and amongst them respectively, as are hereinbefore contained limited and provided, with respect to the sons and daughters of my said brother M. F.; and in case my said brother N. F. shall die without leaving any children of his body lawfully begotten, or there being such, all such of them as shall be sons shall die under the age of 21, and without issue as aforesaid, and all such as shall be daughters shall die under that age and unmarried, then subject as aforesaid, in trust for my said brother O. F. for his life, with remainders, in like manner, to his first and other sons, and to his daughters as tenants in common, in like manner; and with

and subject to such conditional limitations as are before provided, with respect to the sons and daughters of my said brothers M. F. and N. F. successively ; and in case the said O. F. shall die without leaving any children as aforesaid, or, there being such, if all such as shall be sons shall die under the age of 21, and all such as shall be daughters shall die under that age and unmarried, then, subject as aforesaid, in trust for T. C., the eldest son of ———, for his life, with remainders to his first and other sons, and to his daughters as tenants in common, in like manner, and with and subject to such conditional limitations as are before provided, with respect to the sons and daughters of my said brothers, M. F., N. F., and O. F., successively ; and in case the said ——— shall die without leaving any children as aforesaid, or, there being such, all such as shall be sons shall die under 21, and all such as shall be daughters shall die under that age and unmarried, then subject as aforesaid, in trust for B. C., the second son of the said ———, for his life, with remainders to the first and other sons aforesaid, and to his daughters as tenants in common in like manner, and with and subject to such conditional limitations as are before declared with respect to my aforesaid brothers ; and in case the said B. C. shall die without leaving any children as aforesaid, or, there being such, all such as shall be sons shall die under 21, and without issue as aforesaid, and all such as shall be daughters shall die under that age and unmarried, then, subject as aforesaid, in trust for G. F., the daughter of the said ———, by his present wife, for her life, with remainder to her first and other sons, and to her daughters as tenants in common, in like manner, and with and subject to such conditional limitations as are before provided, with respect to my said brothers and their children respectively : but in case the said &c. shall all happen to die without leaving any issue lawfully begotten as aforesaid, then I direct my said trustees to stand possessed of all the rest residue and remainder of my said estate and effects, upon the trusts, &c.

## No. 10.

*Will of an unmarried Man, disposing of Property chiefly in Charities and Legacies.*

Debts, funeral  
and testamen-  
tary charges.

A copyhold  
estate to two  
persons as te-  
nants in com-  
mon.

Charities.

THIS is the last will and testament of me, ———, of ——— street, in the parish of ———. I desire to be buried in the same grave with my late wife, in ——— churchyard, with as little ceremony as may consist with decency and propriety, and that a neat monument with proper inscriptions may be placed over the said grave, to her memory and mine; and my will is that all my funeral and testamentary expenses, and all debts which shall be justly owing by me at my death, may, in the first place, be duly paid and satisfied, with the payment whereof I hereby charge all my personal estate and effects of every description. I give devise and bequeath unto ——— and ——— all that my copyhold or customary messuage, or tenement, garden and premises, with the appurtenances situate in ——— aforesaid, held by me of the manor of ———, and which I have duly surrendered to the use of my will, to hold to them and their heirs and assigns for ever, as tenants in common and not as joint tenants. I give unto the treasurer for the time being of St. George's Hospital, at or near Hyde Park Corner, the sum of ———£. to be applied to the purposes of the said hospital; to the treasurer for the time being of the Middlesex Hospital, in or near ———, the like sum of ———£. to be applied to the purposes of the said hospital; to the treasurer for the time being of the Asylum for the Support and Education of the Deaf and Dumb Children of the Poor, situate in or near the Kent Road, near St. George's Fields, the like sum of ———£. to be applied to the purposes of the said asylum; to the treasurer for the time being of the Asylum, or House of Refuge for Orphan Girls, situate near or between Westminster Bridge and St. George's Fields aforesaid, the like sum of ———£. to be applied to the purposes of the said asylum; and to the treasurer for the time being of the ——— Charity School, in or near ———, the like sum of

—/ to be applied to the purposes of the said school; and as to all the rest, residue and remainder of my lands, tenements, hereditaments and real estate whatsoever and wheresoever, to which I am beneficially entitled, or which have been conveyed to or vested in me by way of mortgage or security, or in trust, and all my estate right title and interest in and to such mortgaged premises, and all securities for money, and all my stocks, turnpike bonds, insurance and other shares, and all other my goods chattels and personal estate and effects whatsoever and wheresoever, and of what nature or kind soever, (except such as are herein specifically or otherwise by me disposed of) and all my estate and interest therein respectively, I give devise and bequeath unto A., B., C., and D., their heirs executors and administrators respectively, according to the several natures and qualities of the same, upon the trusts following, (that is to say,) upon trust that they the said A., B., C., and D., and the survivors and survivor of them, and the heirs executors and administrators of such survivor, do and shall stand and be seised and possessed of all the estates and property vested in me as a trustee upon the trusts thereof, declared concerning the same respectively, and of the premises which I am seised or possessed of or entitled to by way of mortgage, upon trust to re-convey, assign, and dispose of the same respectively, when the principal and interest, and all other monies thereby secured, respectively shall be paid off, and do and shall receive the principal and interest, and other monies which shall be due therefrom respectively, and give receipts for the same when paid, and also do and shall, as soon as conveniently may be after my decease, collect and get in all such parts of the said residue as shall consist of money, or securities for money, and do and shall sell and dispose of all such of the said residue of my real estates of whatsoever denomination, to which I am beneficially entitled, and whereof I have power to dispose, and all my leaseholds and chattels real, and all other such parts of my personal estates and effects as shall be saleable (except such as herein are by me specifically disposed of) either by public auction or private contract, or otherwise, at their discretion, at or for the best price and prices that can or may be had and obtained for the same respectively; and I hereby declare that the receipt or receipts of my said trustees, or the survivor of them, or the executors or administrators of such survivor, or of the trustees or trustee of this my will, for the time being, shall be effectual discharge

Sweeping residuary devise to trustees.

Upon trust as to the property vested in the testator as trustee upon the trusts concerning the same, as to the premises held on mortgage to receive the debt and interest and re-convey, and as to the rest of the residuary property to get in and sell, and convert into money, &c.



Out of the money which shall be produced by the sale of the personal estate, to provide clothes for certain poor persons.

And bread for such as do not receive alms, or parochial relief.

upon every such sale or sale<sup>s</sup> to the purchaser or purchasers of the several premises herein made saleable, or any part or parts thereof, for his her or their purchase monies, or for so much money as shall be therein acknowledged or expressed to have been received; and that such purchaser or purchasers, his her or their heirs executors administrators and assigns, or any of them, shall not afterwards be answerable or accountable for any misapplication or nonapplication of such purchase money so received, or any part or parts thereof; and I will and direct, that out of the monies which shall arise and be produced by the sale or sales of such part or parts of my said estates and effects as are merely of a personal nature, except my leasehold tenements, the sum of ——.l. of lawful money of Great Britain, be set apart, and laid out and invested in the purchase of stock in some or one of the government funds or parliamentary stocks of Great Britain, the same to be transferred into the names of my said trustees, or the survivors or survivor of them, or the executors or administrators of such survivor, or the trustees or trustee for the time being, of this my will, in the proper books kept for that purpose; and my will is that my said trustees or trustee for the time being, do stand possessed of and interested in the said sum of 2400l., or the stock or securities in which the same may be invested; upon trust to pay and apply so much of the annual interest dividends and proceeds thereof as they my said trustees for the time being shall think necessary or proper for purchasing suitable clothes or apparel for the 10 poor men and 10 poor women, for the time being belonging to and residing in the almshouses called ——— almshouses at ——— in the county of ——— at or about Christmas yearly, and to pay, apply, or dispose of the remainder thereof in equal proportions among or to and for the use and benefit of the said poor men and women. And I further direct that out of the said monies which shall arise and be produced by the sale or sales of such part or parts of my said estates and effects as are merely of a personal nature, except my leasehold tenements, the further sum of ——.l. of lawful money of Great Britain shall be set apart and placed out in the same manner as I have before directed with respect to the said last mentioned sum of money, and that my said trustees or trustee for the time being do lay out and apply the dividends and interest of the said last mentioned sum, or the stocks funds and securities in or upon which the same shall be invested as aforesaid in the purchase of bread of good quality to be dis-



tributed every Sunday morning after divine service among such 20 of the most deserving poor persons for the time being residing in the same parish and the township of ———, and who shall not receive other alms or parochial relief, the exercise and distribution of which charity my said trustees are hereby authorized and recommended to commit to the discretion of the rector and churchwardens of the said parish of ———, for the time being. And I will and desire that my said trustees and the survivors or survivor of them, or the trustees or trustee of this my will for the time being, do and shall out of the said trust monies so to arise and be produced by such sale and sales of my real and personal property, or which shall be collected or got in, or be in their hands under and by virtue of this my will, raise and set apart the sum of 7000*l.* of lawful money of Great Britain, and place out and invest the same in some or one of the public funds or parliamentary stocks of Great Britain in the names of my said trustees or trustee for the time being, and do and shall stand and be possessed of and interested in the same money, stocks, funds, and securities, in trust to pay the dividends and interest thereof unto my sister M. H. the wife of T. H. of ———, in the said county of ———, or to authorize and empower her to receive the same half yearly as the same shall become due during her natural life, the same to be paid into her own hands, or to such person or persons as she shall by writing under her hand appoint to receive the same, notwithstanding her coverture, and not to be subject to the controul, debts, or engagements of her husband, and her receipts, or the receipts of such person or persons as she may appoint to receive the same, to be the only proper discharges for the same; and, after her decease, do and shall pay to, or empower her said husband T. H., if he shall survive her, to receive the said dividends and interest of such stock for and during the remainder of his natural life; and after the death of the survivor of them the said M. H. and T. H., that they my said trustees, or the trustees or trustee of this my will for the time being, do and shall transfer the principal of such last mentioned stock unto and equally between and among all and every the child or children of the said M. H. and T. H. who shall be living at the decease of the survivor of them, and the lawful issue of such of the children of the said M. H. and T. H. as shall have died in the lifetime of the survivor of them, in equal shares and proportions, but so and in such manner as that such issue of any of the said children who shall

To set apart 7000*l.*, and place out the same in the funds, and to pay the interest or dividends to the testator's sister, for her separate use, and after her decease, to her husband for his life, and after the death of the survivor, to pay over the principal to and among their children.

Similar settlement on A. C., the wife of H. C., and her children, by H. C.

have died in the lifetime of the survivor of the said M. H. and T. H. shall only receive (in equal proportions if more than one) the share or proportion to which their his or her deceased parent would, if living, have been entitled. I also direct that my said trustees, or the trustees or trustee of this my will for the time being, do and shall by and out of the said trust monies and effects so in their hands as aforesaid, raise and set apart the further sum of 3000*l.* of like lawful money, and place out and invest the same in some or one of the public funds or parliamentary stocks of Great Britain in their or his own names or name as aforesaid, and do and shall stand and be possessed of and interested in the same, in trust to pay the dividends or interest of such last mentioned stocks, funds, and securities unto A. C. the wife of my nephew H. C. of ——— in the said county of ——— half yearly as the same shall become due, during her natural life, the same to be paid into her hands or to such person or persons as she shall by writing under her hand appoint, notwithstanding her coverture, exclusively of her present or any future husband, who is not to intermeddle therewith, nor is the same to be subject to his controul, debts, or engagements, and her receipts or the receipts of such person or persons as she may so appoint to receive the same only to be effectual discharges for the same, and after her decease do and shall transfer the principal of such stock unto and equally between or among all and every the child and children of the said A. C. by H. C. who shall be living at her decease; and the lawful issue of such of the said children as shall be then dead in equal shares and proportions, but so and in such manner as that the issue of any of the said children who shall die in the lifetime of the said A. C. shall only receive (in equal proportions if more than one) the share to which his her or their deceased parent would, if living, have been entitled. And I further desire and direct that my said trustees or the trustees or trustee for the time being do and shall out of the same trust monies and effects raise and set apart the further sum of 3000*l.* of like lawful money, and place out and invest the same in some or one of the public funds or parliamentary stocks of Great Britain in their or his own names or name, and do and shall stand and be possessed of and interested therein, in trust to pay the dividends or interest thereof unto M. T. the wife of C. T. of ——— in the said county of ———, half yearly, as the same shall become due during her natural life, the same to be paid into her hands or to such person or persons as she shall by writ-

And on M. T., the wife of C. T. and her children.

ing under her hand appoint to receive the same, notwithstanding her coverture, exclusively of her present or any future husband, and who is not to intermeddle therewith, nor is the same to be subject to his controul, debts, or engagements, and her receipts, or the receipts of such person or persons as she shall so appoint to receive the same only to be effectual discharges for the same; and after her decease do and shall transfer the principal of such last mentioned stock unto and equally between and among all and every the child and children of the said M. T. by C. T. who shall be living at her decease, and the lawful issue of such of the said children as shall then be dead in equal shares and proportions, but so and in such manner as that the issue of any of the said children who shall die in the lifetime of the said M. T. and C. T. shall only receive (in equal proportions if more than one) the share to which their his or her deceased parent would, if living, have been entitled. And I will and direct that my said trustees or the trustees or trustee of this my will for the time being do and shall out of the said trust monies and effects also raise and pay for and to ——— the eldest son and ——— the second son of ——— the elder the sum of 1000*l.* a-piece of lawful money of Great Britain, and for and to ——— and ——— daughters of the said ——— the elder the sum of 500*l.* a-piece of like lawful money (exclusively of the fund to which they or their respective issue may become entitled upon the decease of their said mother as hereinbefore mentioned) the same to become vested in and payable to the said ——— and ——— the sons when and as they respectively shall attain the age of 21 years, and the said ——— and ——— the daughters when and as they shall respectively attain that age or be married, and do and shall out of the said trust monies and effects raise and pay for and to the three sons and two daughters of ——— (that is to say) A. B. H. R. and T. the sum of 200*l.* a-piece of like lawful money; and I will and declare that as to the legacies hereinbefore given or directed to be raised and paid to and for the said A. B. H. R. and T., if any one or more of such children respectively shall happen to die before he she or they shall have acquired a vested interest or vested interests under this will, the legacy or share of the person or persons so dying shall go and survive to his her or their surviving brothers and sisters, and the issue of such of the said children as shall have lived to acquire vested interests, and that all and every the accruing share and shares shall respect-

The sum of 10,000*l.* to his niece, to be laid out in the funds, and disposed of as she shall direct.

The sum of 5000*l.* to his nephew —, and his books, maps, &c.

Legacies, not become vested, to be laid out in the funds, to accumulate, with power for the trustees to apply the same, or so much as they shall think proper, towards the maintenance of the children presumptively entitled. Residue to his nephew —,

Clause for changing trustees &c.

ively again be subject to the same condition and contingency of survivorship and accruer, as is hereinbefore declared touching the original legacies or shares. I give and bequeath to my dear niece (the daughter of —, late of —, and — his wife,) who has for many years resided with me, the sum of 10,000*l.* of lawful money of Great Britain, which sum I desire may be laid out by my said trustees or trustee, for the time being, in some or one of the public funds, or parliamentary stocks of Great Britain, in the joint names of her the said —, and my said trustees or trustee, for the time being, to be disposed of as she shall, by writing under her hand, direct. I also give to my said dear niece, —, all my household goods and furniture, plate, china, glass and linen, to and for her own absolute use and benefit; and I give to her brother, my nephew, the said —, (son of the said —, and —, his wife,) the sum of 5000*l.* of lawful money of Great Britain, for his own absolute use and benefit. I also give to him, the said —, all my books, printed or written, and all my maps accounts and papers whatsoever. I desire that such of the legacies hereinbefore given, as shall not have become vested interests under this my will, may be laid out in some or one of the public funds, or parliamentary stocks of Great Britain, to accumulate for the benefit of those who respectively shall be presumptively entitled thereto, with full power, however, for my said trustees or trustee, for the time being, to pay or apply the dividends and interest thereof respectively, or so much thereof as they in their or his discretion may think proper or requisite, for or towards the maintenance or education of the person or persons respectively so entitled, in such manner as my said trustees shall think most for their respective benefit and advantage. And I direct that my said trustees shall stand possessed of the net surplus, or remainder of the whole of the said residue of my estate, effects, and property in trust for, and for the only absolute use and benefit of my nephew, —, the younger, his executors and administrators, and to be paid, transferred, and disposed of, as he or they shall from time to time direct; and my will is, that all the legacies and bequests hereby given shall be paid and appropriated by my said trustees for the time being, as soon as conveniently may be after my decease. And I further declare it to be my will, and I do hereby direct, that in case the said —, or any or either of them, or any succeeding or future trustee or trustees, shall die, or be desirous of being discharged

from, or become incapable of acting in the same trusts before the same shall be fully executed and performed, that then, and in every such case, it shall and may be lawful to and for the surviving or continuing trustees or trustee of this my will, for the time being, or the executors or administrators of such survivor, by any writing, under his or their hand and seal, or hands and seals, and to be attested by two or more credible witnesses, to nominate or appoint any other fit and respectable person or persons to be a trustee or trustees, for the purposes aforesaid, or such of them as shall be then subsisting, or capable of taking effect, in the place or stead of the trustee or trustees so dying, or desiring to be discharged, or becoming incapable of acting in the said trusts; and that when and so often as any such new trustee or trustees shall be nominated and appointed as aforesaid, the surviving or continuing trustees or trustee for the time being, or the executors or administrators of such survivor, shall assign and transfer my said trust estate and property, in such manner (so far as the nature thereof will admit,) as that the same may become vested in such new trustee, and the surviving or continuing trustee or trustees jointly, or in such new trustee only, upon the trusts, and to and for the intents and purposes hereinbefore declared of and concerning the said trust estate and property respectively, and which shall be then subsisting, or capable of taking effect, and so from time to time; and such new trustee and trustees shall and may act in the execution and management of the trusts aforesaid, and shall be and be considered as invested with such and the same powers and authorities, as if he or they had been originally appointed by this my will; and further, that they, the said ———, or any or either of them, or their any or either of their executors or administrators, shall not be answerable for or liable to make good any casual or involuntary loss, which at any time or times may accrue or happen unto the said trust monies, or the securities for the time being in which the same shall be invested, or any part thereof, or with respect to any other part of the said trust estate, without his or their wilful default; nor shall they, or any of them, be answerable or accountable, the one for the other or others of them, or for the acts, deeds, receipts, payments, neglects, or defaults of the other or others of them, but each of them for his own acts, deeds, receipts and payments only, and for such monies only as shall actually come to his or their several and respective hands, and not for any money or stock for which they, or any of them, shall join in any transfer,

or sign any receipt or receipts, for conformity only, nor with or for any loss or damage which may happen, by depositing all or any of the trust monies aforesaid in any bank or banker's hands, or elsewhere, for safe custody, nor with or for any other loss or damage which shall or may happen in or about the execution or exercise of all or any of the trusts aforesaid, without their wilful defaults. And that it shall and may be lawful to and for them, the said trustees respectively, and their respective executors and administrators, from time to time, by and out of the trust monies, which shall come to their or any of their hands, in the first place to deduct and retain, and reimburse to themselves respectively, and allow to their or his co-trustee or co-trustees all such loss, costs, charges and expenses whatsoever, as he they or either of them shall or may respectively pay, suffer, sustain, expend, or be in any way put unto, in or about the execution of all or any of the trusts or powers hereinbefore mentioned or created, or any matter or thing in any wise relating thereunto.

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No. 11.

*A Will, disposing only of personal property, in favour of the Testator's daughter, and her children.*

Directions as to place and manner of interment.

**THIS** is the last will and testament of me, J. S., of T., in the county of ———, esquire. First, I will and direct, that in case I shall die within the distance of 10 miles from S., in the said county of ———, my body may be interred in the parish church there (where my late wife, A. S., lies buried,) in a decent, but very plain manner, at the discretion of my executors, hereinafter named, (who, in case of any occurrence taking place to prevent my being buried at the place above-mentioned, may direct my interment at such other place as they shall judge most proper,) the expenses attending which interment, and also all my just debts, and the expenses of proving this will, and also the legacies hereinafter by me given, I do direct my executors to pay and discharge as soon as conve-



niently may be after my decease. I do hereby constitute and appoint A. B., of ———, C. D., of ———, and E. F., of ———, to be the executors of this my will; and, in the first place, I give and bequeath to them, the said A. B., C. D., and E. F., as such my executors, the capital stock or sum of 8000*l.* five per cent. annuities, or so much of such other stock standing in my name at the time of my decease as will be sufficient to produce the annual sum of 400*l.*; and in case I shall not, at the time of my decease, have sufficient stock standing in my name, to produce that sum annually, then I give and bequeath to my said executors so much money as will be sufficient to purchase so much stock in one or other of the parliamentary funds of Great Britain, (according to the then current price thereof,) as will produce such annual sum, (which stock I do hereby direct my executors to purchase accordingly,) upon trust, that they, my said executors, do and shall cause the said stock to be transferred into their own names, jointly with the trustees or trustee under the settlement or contract made on my marriage with my present wife, J. S.; and do and shall pay the interest or dividends arising from such stock to my said wife, (when and as the same shall from time to time arise and be received,) during her life, for her own use and benefit: and from and after the decease of my said wife, J. S., my will is, and I do direct, that the stock hereinbefore by me given or directed to be purchased for her benefit shall sink into, and become part of, my residuary estate, and shall go and be applied according to the dispositions hereinafter by me made of the same. Provided, and I do hereby expressly declare my will to be, that the provision made by this my will for my said wife, J. S., is by me intended to be, and to be accepted by her, in lieu and in full satisfaction and recompence of all such benefit or provision, as I have, by such marriage settlement or contract, provided or made, or covenanted, agreed, or contracted to provide, or make for her, either by way of annuity, or otherwise howsoever. Also, I give and bequeath to A. B., C. D., and E. F., the sum of 5000*l.* of lawful money of Great Britain, upon trust, that they, my said executors, or the survivors or survivor of them, or the executors or administrators of such survivor, do and shall, with all convenient speed, place out and invest the same sum, and every part thereof, in their or his own names or name in the public stocks or funds of Great Britain, or on real or government securities in England, at interest, and do and shall stand and be possessed of and interested in such last-mentioned stocks, funds, or secu-

Appointment of executors.

Bequeaths a certain quantity of stock in the public funds to his executors.

The stock to be transferred into their own names, together with the names of the trustees in the settlement or articles made on the testator's marriage.

To pay the dividends to his wife for her life, and after her death the principal to sink into and become part of the testator's residuary estate.

That the said provision for his wife shall be in lieu of her dower.

Testator then gives 5000*l.* to his trustees.

To invest the same in their names.



To transfer and assign the same last-mentioned stocks, &c. to the children of testator's daughter, M. E. L. according to the appointment of the said M. E. L.

And in default of appointment, among the children equally, with survivorship.

rities, upon the several trusts, and to and for the several ends, intents, and purposes, and with under and subject to the several powers and provisos hereinafter expressed and declared of and concerning the same, that is to say, upon trust, that they, my said executors and trustees, or the trustees or trustee for the time being, do and shall transfer, assign, and pay the said last-mentioned stocks, funds, and securities unto all and every the child and children of my daughter, Mary Elizabeth L., (wife of J. L. C., of B., in the county of ———,) by her present husband, (other than and except an eldest or only son, or an eldest daughter, entitled for the time being to the estate at B. aforesaid, which is entailed on the eldest child of their marriage) at such age, day, or time, if there be but one, and if more than one, then at such respective ages, days, or times, and in such parts, shares, and proportions, and subject to such conditions, restrictions, and limitations over, (such limitations over to be for the benefit of some or one of the said children) as my said daughter, M. E. L., at any time or times during her life, by any deed or deeds, writing or writings, with or without power of revocation, to be sealed and delivered in the presence of and attested by two or more credible witnesses, or by her last will and testament in writing, or any writing in the nature of or purporting to be her last will and testament, or any codicil or codicils thereto, to be signed and published in the presence of, and attested by two or more credible witnesses, (whether she shall be covert or sole, and notwithstanding any coverture she may be under) direct or appoint; and in default of such direction or appointment, then upon trust that they, my said executors and trustees, or the survivors or survivor of them, or the executors or administrators of such survivor, do and shall transfer the said stocks, funds, or securities to such child, if there shall be but one, and the same shall be a daughter, on her attainment to the age of 21 years, or day of marriage, provided the same is contracted with the consent of my said daughter, M. E. L., or if a son, upon his attainment to the age of 21 years; and if there shall be more such children than one, then my will is, that the same stocks, funds, and securities, in default of such direction or appointment as aforesaid, be equally divided between or among them, share and share alike; the share or shares of such of them as shall be a daughter or daughters to be transferred to her or them respectively, on her or their attaining her or their age or respective ages of 21 years, or on the day or respective days of her or their marriage, which shall first happen, (provided such

marriage shall be had with the consent of my said daughter M. E. L.); and the share or shares of such of them as shall be a son or sons to become vested in him or them respectively, on his or their attaining his or their age or respective ages of 21 years. Provided nevertheless, and I do hereby declare, that the appointment to be made by my said daughter M. E. L., of any such portion or portions as aforesaid, pursuant to the power hereinbefore given to her, shall not be invalidated or prejudiced by any omission or default of her appointment of the residue of such portions, under or by virtue of any such direction or appointment, made pursuant to the same power, but that any such child or children who shall be benefited by any such partial appointment shall have or be entitled to no further or other share of or in the unappointed residue of the said stocks, funds and securities, until every other child shall have received so much of such unappointed residue as will make his or her share or portion equal, if not otherwise so, to that of the child so taking under such direction or appointment as aforesaid. Provided, and I do hereby declare, that if any such child or children, being a son or sons, shall depart this life before he or they shall attain his age or their respective ages of 21 years (without leaving lawful issue of his or their body or bodies) or being a daughter or daughters shall depart this life before she or they shall attain her age or their respective ages of 21 years, or be married, then and in default of any such direction or appointment as aforesaid, the share or shares of him her or them so dying, of and in the said stocks, funds, and securities, shall go and accrue to the survivors or survivor or others or other of such children, and be equally divided between or among them, if more than one, share and share alike, and be transferable at such ages, days, and times as his her and their original portion or portions shall, by virtue of this my will, become transferable as aforesaid; and that in case of the death of any other of the said children (without having lawful issue before such accruing or surviving share or shares shall become vested as aforesaid) then every such accruing or surviving share or shares shall again become subject and liable to such further right, chance, contingency, or condition of accruer or survivorship, as hereinbefore is declared, touching the original portion or portions. Provided nevertheless, and I do hereby expressly declare, that in case any such child or children shall have left issue of his her or their body or bodies lawfully begotten, then my will is, that such issue shall have and be entitled to such share or shares of and in the said stocks;

That any appointment of part shall stand good: but in case of a partial appointment, those who are the objects of it shall not come in with the rest, until they shall have so much of the unappointed residue as will make their shares equal.

In case of any dying and leaving issue, such issue to take the shares of their respective parents, at the

same age and time as is before declared with respect to the shares of their parents.

The interest of their respective shares to be applied in maintenance.

That the daughter is to have the education and maintenance of her children. The said sum of 5000*l.* to be received in lien and satisfaction of the like sum of 5000*l.* secured by bond, to be paid to the husband of his daughter on the marriage.

Which said marriage portion cannot now be paid to the husband, on account of his mental imbecillity. If any claim for such portion shall be set up and litigated, the trustees are to resist it, and defray the expenses out of the residuary estate.

funds and securities as his her or their deceased parent or parents would have had and been entitled to under this my will, if living, (such share or shares to be transferred to such issue, at such age or time as hereinbefore declared with respect to the transfer of their parents' shares). And upon further trust, that they my said executors and trustees, or trustee for the time being, do and shall pay and apply the dividends, interest and proceeds of the share or shares of such of the said children as shall not have acquired a vested interest in the share or shares hereinbefore provided or intended for him her or them, for or towards his her or their maintenance and education respectively, until the same respectively shall become transferable; until which period it is my will that my said daughter M. E. L. shall (if she shall so long live) have and be entrusted with the maintenance, education, and controul of her said children, and shall receive from my said trustees or trustee such dividends, interest, and proceeds, for the purpose of enabling her to undertake, carry on, and defray the expenses of the same. Provided, and my will is, and I do hereby expressly declare, that the said sum of 5000*l.* hereinbefore given and directed to be laid out for the benefit of the younger children of my said daughter M. E. L. by the said J. L. C., her present husband, is by me meant and intended, and shall accordingly be considered, and be accepted and taken, as and in lieu and full satisfaction and recompence of the sum of 5000*l.* which, by a bond executed by me previous to the marriage of my said daughter with her said husband, I have secured to be paid for the benefit of such younger children, according to his appointment, which appointment, by reason of the mental imbecillity of the said J. L. C., cannot now be made in a proper reasonable and effectual manner. And therefore my will further is, and I do hereby accordingly direct and declare, that in case any claim or demand shall be made, and any proceedings at law or in equity shall be commenced or instituted, either by the said J. L. C., or by any other person or persons in his name, or on his account or behalf, or claiming by, from, through, or under, or in trust for him, upon or in respect of the said bond, or the said sum of 5000*l.* thereby secured, or any part thereof, or any interest to arise therefrom, my said executors and trustees, or the trustees or trustee for the time being, shall forthwith apply to the High Court of Chancery for redress against such claim and demand, or adopt such proceedings as they shall be advised to pursue by their counsel, for resisting the same; the expenses

of obtaining which opinion of counsel, and of such application to the said court, and of all such other proceedings as shall be advised and adopted as necessary to resist such claim, I do hereby empower and direct my said executors and trustees, or the trustees or trustee for the time being, to pay and discharge out of my residuary personal estate. And my will further is, and I do hereby expressly order, that in case any person or persons, for whom or for whose benefit a provision is hereby made, or intended to be made, shall make or prosecute any claim or demand for or in respect of the said bond, or the said sum of 5000*l.* or any part thereof, then and from thenceforth such person or persons shall be utterly excluded and debarred from all benefit or provision under or by virtue of this my will, or of the dispositions therein contained. Provided also, and my will is, and I do hereby further direct, that in case all and every the child and children of my said daughter M. E. L., by the said J. L. C., her present husband, (other than and except an eldest or only son, and an eldest or only daughter, entitled, for the time being, to the said estate at B. aforesaid) who, being sons, shall depart this life under the age of 21 years, without leaving lawful issue of their or any of their bodies, or being daughters, shall depart this life under that age and without having been married, then they, my said executors and trustees, or the trustees or trustee for the time being, shall stand possessed of and interested in the said stocks, funds, and securities, or so much thereof as shall remain unappointed or undisposed of, as aforesaid, in trust for, &c.

And I do hereby also give and bequeath to the said A. B., C. D., and E. F., their executors, administrators and assigns, the capital stock or sum of 800*l.* five per cent. annuities, or so much of such other stock standing in my name at the time of my decease, as will be sufficient to produce the annual sum of 40*l.*; and in case I shall not, at the time of my decease, have sufficient stock standing in my name, to produce that sum, then I give and bequeath to my said executors and trustees so much money as will be sufficient to purchase so much stock (according to the then current price thereof) as will produce such annual sum, upon trust, that they my said executors and trustees, or the trustees or trustee for the time being, do and shall cause the same to be transferred into their or his own names or name, and do and shall, until my grandson J. L., the eldest son of my daughter M. E. L., shall come into possession of the estate at B. aforesaid, (so entailed on

And if any body shall prosecute any claim upon the bond, this legacy to be void.

Testator devises 800*l.* capital stock to his trustees, to pay the dividends to the eldest son of his daughter, until he shall come into possession of the estate settled upon him, by way of support in the interim; and when he shall come into possession of the settled estate, or if he shall die in the lifetime of his father, then the said capital to sink into the residue.

An additional  
legacy to two  
grand-daugh-  
ters.

the eldest child of the marriage of my said daughter and her present husband, as hereinbefore mentioned) pay the interest or dividends arising from the said stock, unto my said grandson J. L. and his assigns, and authorise and empower him and them to receive the same to and for his own use and benefit. Provided, and my will is, and I hereby direct, that from and after the decease of my son-in-law, the aforesaid J. L. C. whereby my said grandson J. L. will come into possession of the said estate at B. aforesaid, or be entitled to the receipt of the rents, issues, and profits thereof, or in case my said grandson shall depart this life in the lifetime of his said father, then from and after his decease, whichever shall first happen, the stock hereinbefore by me given, or directed to be purchased for the benefit of my said grandson, shall sink into and become part of the residue of my personal estate, and shall go and be applied according to the dispositions thereof hereinafter contained. And I do hereby give and bequeath to each of my grand-daughters, S. and M., (over and above their share in the said sums of '5000*l.*, as two of the younger children of my said daughter, M. E. L., by the said J. L. C. her present husband, and over and besides such other shares and benefit as they respectively shall have or take under this my will) the sum of 1000*l.* of lawful money of Great Britain, to be an interest vested in them respectively on their respectively attaining the age of 21 years, or on their respective days of marriage, with such consent as hereinbefore mentioned, which shall first happen; nevertheless the actual payment thereof shall be postponed until after the decease of my said daughter, M. E. L. (who, during her life, shall have and be entitled to the interest and produce thereof). Provided, and I do hereby declare, that in case either of my said grand-daughters S. and M. shall depart this life before she shall attain her age of 21 years, or be married, then the sum of 1000*l.* hereinbefore given to her, (in the event of her attaining such age or being married) shall go and be paid to the survivor of my said two grand-daughters, to become vested and payable as hereinbefore is mentioned in respect to her original share.

And in case both my grand-daughters S. and M. shall depart this life under the age of 21 years, and without having been married, then the said two several sums of 1000*l.* (hereinbefore given to them in the event of their attaining such age, or being married as aforesaid) shall sink into and become part of

my residuary personal estate, and shall go and be applied according to the dispositions thereof hereinafter contained. And I do hereby give and bequeath to my said executors and trustees the like sum of 1000*l.* of like lawful money, upon trust, that they my said executors and trustees, or the trustees or trustee for the time being, do and shall lay out and invest the same in their or his own names or name, in or upon government or real securities in England, at interest; and do and shall during the minority of my natural son (1) J. S. now aged 13 years or thereabouts, born at ———, on the 23d day of October 1789, now at school at ———, pay, apply, and dispose of the dividends, interest, or proceeds of the said last-mentioned stocks funds and securities for and towards his maintenance and education, and in providing clothes and other necessities for him, in such way as my said trustees or trustee shall think advisable: and upon further trust, that when and so soon as my said natural son J. S. shall have attained the full age of 21 years, then that my said executors and trustees, or the trustees or trustee for the time being, do and shall transfer and assign the said stocks, funds, and securities unto my said natural son, to and for his own use and benefit. Provided nevertheless, and I do hereby declare, that it shall and may be lawful to and for my said executors and trustees, or the trustees or trustee for the time being, to raise by and out of the said stocks, funds, and securities, upon which the said sum of 1000*l.* shall be so invested, any sum or sums of money, not exceeding in the whole the sum of ———*l.* for the

Gives 1000*l.* to be laid out by the trustees in the funds in their names, who are to apply the dividends in maintaining the testator's natural son.

And when he comes of age to transfer the stock to him for his own use.

With liberty to apply a certain sum as an apprentice fee, or for placing him out.

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(1) Illegitimate children may take when born by their names of reputation, or by words clearly describing them; and the rule is, that they must be pointed out by clear description, for the law shews them no favour. And if a man devises to such natural children as shall be born of J. S., such children born after the making of the will shall not take, *Metham v. Duke of Devon*, 1 P. Wms. 529. nor even a child *en ventre sa mere*; for besides the objection on the ground of immorality, a bastard cannot take until he has gained a name by reputation, which cannot be before he is born. Thus, under a bequest “to such child or children, if more than one, as A. may happen to be ensient of by me,” a natural child, of which A. was then pregnant, was held incapable of taking. Though the master of the Rolls, Sir W. Grant, seemed to think that a bequest to the natural child, of which a particular woman was ensient, without reference to any person as the father, might probably be good, as there was no uncertainty in the bequest. The case was decided upon the rule of law which does not acknowledge a natural child to have any father, even by reputation, before its birth. *Earle v. Wilson*, 17 Ves. Jun. 523.



No part of such sum of 1000*l.* to be applied in paying any bills owing at testator's death, for the said son.

This sum, if not wanted, to sink into the residue.

Gives to his wife all his furniture, plate, linen, china, liquors, &c.

Such books and papers as may be necessary for settling or elucidating his affairs, to his executors. His other books and papers to his daughter.

200*l.* to his wife for mourning. 20*l.* for his servants' mourning. To his wife five guineas for a ring, and a

purpose of placing out my said natural son J. S. apprentice, or otherwise for preferring or advancing him in or to any profession, business or employment, and to pay, apply, and dispose of the money so to be raised for any of those purposes accordingly, in such way and manner as they or he shall judge most advisable for his benefit. Provided nevertheless, and I do hereby expressly declare, that no deduction or abatement shall be made out of the said sum of 1000*l.* for or on account of any bills that may, at the time of my decease, be due or be accruing, for or in respect of the maintenance, education, or clothing of my said natural son J. S.; but that such bills shall be defrayed, with the rest of my debts, out of my residuary personal estate, before any division thereof shall be made.

Provided, and my will is, and I do hereby declare, that in case my said natural son J. S. shall depart this life before he shall attain the full age of 21 years, then the said sum of 1000*l.* hereinbefore given and directed to be laid out for his benefit, or the stocks, funds, or securities wherein or upon which the same shall then be invested, or so much thereof as shall not have been applied or disposed of for the advancement or preferment of my said natural son, according to the authority hereinbefore contained and given for that purpose, shall sink into and become part of my residuary personal estate, and shall accordingly be applied upon the trusts hereinafter by me directed concerning the same. And I do hereby give and bequeath to my said wife, J. S. for her own use and benefit, all my household furniture, plate, linen, china, liquors, provisions, and other household goods and furniture that may be in and about my dwelling house at the time of my decease, save and except all books, papers, and manuscripts, it being my will and desire, and I do hereby direct, that such of the said books and papers as shall be necessary for settling or elucidating my affairs or concerns, shall be delivered to my executors hereinafter mentioned, and that such of the same books, papers, and manuscripts as shall not be necessary for that purpose, shall be delivered to my said daughter M. E. L., to be preserved or destroyed, or otherwise disposed of, as she shall think fit. Also I give and bequeath to my said wife J. S. the sum of 200*l.* for the purpose of providing mourning for herself and children. Also the sum of 20*l.* for mourning to her servants: and also I give to my said wife five guineas for a ring for herself, and 7*l.* 10*s.* for six mourning rings, of



twenty-five shillings each, for any six persons she may think proper to give them to. Also I give to my aforesaid grandson J. L., my diamond ring, and to my grandson W. L. (second son of my said daughter, M. E. L.) or such other son of my said daughter, as at the time of my decease shall be the second son in seniority, my gold watch; or in case my said watch shall be worn out, lost, or destroyed, 30*l.* in lieu thereof. And I give to my nephew, R. C. D., 200*l.* to be paid to him at my death. I give to each of my said executors, hereinbefore by me appointed, twenty guineas for their care and trouble in the execution of this my will; and also a ring of the value of twenty-five shillings: also I give to my servant, S. (for her care and attention to me,) twenty guineas, to be paid to her within one month next after my decease. And as to all the rest, residue and remainder of my personal estate and effects whatsoever and wheresoever, whereof or whereto I or any person or persons in trust for me shall, at the time of my decease, be possessed or entitled, (and not hereinbefore by me otherwise disposed of,) and whereof I have power to dispose by will, I do hereby give and bequeath the same unto my said executors, upon trust, that they the said A. R., C. D., and E. F., or the survivors or survivor of them, or the executors or administrators of such survivor, do and shall, with all convenient speed, collect, get in, and receive such part thereof as shall consist of money, or securities for money, and do and shall convert into money such part thereof as shall not consist of money, or securities for money, and lay out and invest the same, and every part thereof, in their or his own names or name, in the parliamentary stocks or funds of Great Britain, or on real or government securities in England, at interest; and do and shall stand and be possessed of, and interested in, all such stocks, funds, or securities, upon the several trusts, and to and for the several ends, intents, and purposes, and with under and subject to the several powers and provisos hereinafter expressed and declared, of and concerning the same, that is to say, upon trust, that they my said executors or trustees, or the trustees or trustee for the time being, do and shall, during the natural life of my said daughter, M. E. L. pay the dividends, interests, and proceeds of the said last-mentioned stocks funds and securities, unto such person or persons only, and for such intents and purposes only, as my said daughter, M. E. L. shall, by any writing or writings under her hand, from time to time, notwithstanding her present or any future coverture, direct or appoint; and in default of such direction

sum for six rings to friends. Other specific bequests.

Testator gives all the rest and residue of his personal estate to the same trustees.

To convert the same into money, and place it out in the funds, or on government or real securities in England. And to stand possessed of the said stocks, funds, and securities upon trust, to pay the interest and dividends during his daughter's life to such persons as she shall, notwithstanding her coverture, direct and appoint.

And in default of appointment, into the proper hands of his daughter, for her sole and separate use.

Proviso that his daughter shall not incur or anticipate the said dividends.

Power for the daughter to appoint the same either in her lifetime, or after her decease.

And in default of appointment to and among her children equally, with survivorship, except an eldest son, or eldest daughter, entitled as aforesaid.

or appointment, do and shall pay the same, or so much thereof as she shall or may, from time to time, happen to make no direction or appointment of into the proper hands of my said daughter, M. E. L., for her sole and separate use and benefit, exclusively of her present or any future husband, who shall not intermeddle therewith; nor shall the same or any part thereof be subject or liable to the power, controul, debts, or engagements of any such husband, but the receipts of my said daughter, M. E. L., and of such person or persons as she shall or may, from time to time, direct or appoint to receive the same, shall, notwithstanding her present or any future coverture, be good and effectual releases and discharges for the same, or so much thereof as in such receipts shall be expressed or acknowledged to have been received. Provided nevertheless, and my will is, and I do hereby expressly declare, that my said daughter, M. E. L., shall not have power to sell, assign, mortgage, or otherwise incur the said dividends, interest, and proceeds, or any part thereof, by anticipation, whilst in the hands of my said trustees or trustee; and from and after the decease of my said daughter M. E. L. (or in her lifetime, if she shall direct the same by any deed or writing under her hand and seal, executed in the presence of, and attested by, credible witnesses,) upon trust, that they, my said executors and trustees, or the trustees or trustee for the time being, do and shall transfer assign and pay the said last-mentioned stocks, funds, and securities unto all and every the child and children of my said daughter, M. E. L., whether by her present or any after-taken husband (other than and except an eldest or only son, or an eldest daughter, entitled for the time being to the estate at B——— aforesaid,) according to her appointment, by deed or will, in like manner, as hereinbefore declared, with respect to the stocks, funds or securities, wherein or upon which the said sum of 500*l*. (hereinbefore given) shall be invested; and in default of such direction or appointment, then upon trust, that they my said executors and trustees, or the trustees or trustee for the time being, do and shall transfer, assign, and pay the same stocks, funds, or securities unto all and every the child and children of my said daughter, M. E. L., whether by her present or any future husband, (other than and except an eldest or only son or an eldest daughter entitled as aforesaid) in like manner and with the like condition of survivorship and power of maintenance and education to and amongst all such children, and subject to all such powers, provisos, and restrictions as

hereinbefore declared, with respect to the stocks, funds, or securities, wherein or upon which the said sum of 5000*l.* shall be invested. Provided also, and my will is, and I do hereby further direct, that in case all and every the child and children of my said daughter, M. E. L., whether by her present or any future husband (other than and except an eldest or only son, or only daughter, entitled for the time being to the aforesaid estate at B.) shall depart this life before their said shares or any of them shall have become vested according to the directions of this my will, then my said trustees or the trustees or trustee for the time being shall stand possessed of, and interested in, all and every the stocks, funds and securities, wherein or upon which my said residuary personal estate, or any part thereof, shall be placed out, or invested (or so much thereof as shall remain unappointed or undisposed of as aforesaid,) in trust, &c. Provided always, and my will is, and I do hereby declare that it may be lawful to and for my said trustees, or the trustees or trustee for the time being, (with the consent and approbation of my said daughter, M. E. L., signified in writing under her hand, if living, and if she shall be then dead, then of the proper authority of my said trustees or trustee for the time being,) to sell and transfer all or any of the stocks, funds or securities, wherein or upon which any part of my property shall be placed out or invested, in pursuance of this my will (but not without the consent in writing of my said wife J. S. if living, in case any of the stocks funds or securities, directed to be sold or transferred, shall form part of the security or provision hereinbefore devised for the benefit of my said wife during her life) and to lay out and invest the money to be produced by or from such sale or transfer in or upon any other of the parliamentary stocks or funds of Great Britain, or on any other real securities in England, at interest, and from time to time (with the like consent and approbation as aforesaid,) to vary, alter, and transpose all such stocks funds and securities for others of the like nature, when and so often as it shall be desirable or convenient so to do; and that they my said trustees, or the trustees or trustee for the time being, do and shall stand possessed of, and interested in, all such new or other stocks funds or securities upon such and the same trusts, and for such and the same intents and purposes, and with under and subject to such and the same powers, provisos, declarations, and agreements as are hereinbefore declared or contained, concerning the stocks funds or securities, from the sale or transfer whereof

Power for the trustees to vary and transpose the securities.

Clauses for  
changing trus-  
tees, and for  
their safety and  
indemnity.

such new stocks funds or securities respectively shall arise, or such of them as shall be then subsisting or capable of taking effect. Provided also, and my will further is, and I do hereby declare, that if my said trustees, or either of them, or any of their respective executors or administrators, or any future trustee or trustees to be appointed in the stead or place of them or any of them as hereinafter is mentioned, or any of their respective executors or administrators, shall die, or be desirous of being discharged from, or decline to act, or become incapable of acting, in the execution of the trusts hereby in them reposed, or any of them, then and in such case, and when and so often as the same shall happen, it shall and may be lawful to and for my said daughter, M. E. L., by any writing or writings under her hand and seal, (but having the consent of my said wife J. S., if living) to nominate and appoint any other person or persons to be a trustee or trustees in the stead and place of the trustee or trustees so dying, or desiring to be discharged, or declining or becoming incapable of acting as aforesaid, and that when and so often as any new trustee or trustees shall be so nominated or appointed as aforesaid, all the trust monies stocks funds securities and premises, which shall be then vested in the trustee or trustees so dying or desiring to be discharged, or declining to act, or becoming incapable of acting as aforesaid, either solely, or jointly with any other trustee or trustees, shall be thereupon with all convenient speed assigned and transferred in such sort and manner, and so as that the same shall and may be legally and effectually vested in the surviving or continuing trustee or trustees of the same trust monies stocks funds securities and premises, and such new or other trustee or trustees; or if there shall be no continuing trustee of the same, then in such new trustees only, upon the same trusts and for the same intents and purposes as are hereinbefore expressed and declared of and concerning the same respectively, or such of them as shall be then subsisting or capable of taking effect; and that all and every such new trustees shall and may in all things act and assist in the management, carrying on, and executing of the several trusts herein expressed and contained, as fully and effectually, to all intents and purposes, as if he or they had been originally appointed in and by these presents, or as the trustee or trustees, in or to whose place he or they shall succeed, might have done if living, and continuing to act in the execution of the said trusts. And I do appoint my said executors to be the guardians of my several grand-children,

and of my said natural son J. S., during their respective minorities. And my will further is, and I do hereby declare and direct that my said executors and trustees, and such new trustees as may be appointed in pursuance of the power hereinbefore contained, and each of them, their and each of their executors administrators and assigns, shall be charged and chargeable only with and for so much of the said trust monies and premises as they respectively shall actually receive; and that one of them shall not be answerable or accountable for the others or other, or for the acts receipts neglects or defaults of the others or other of them, but each of them only for his own acts receipts neglects or defaults; nor shall they, or any of them, be answerable or accountable for any banker, broker, or other person with whom or in whose hands any of the said monies may be placed for safe custody or otherwise, in the execution of any of the said trusts, nor for the insufficiency or deficiency of any stocks funds or securities, in or upon which any of such monies may be invested, in pursuance of and in conformity to this my will, nor for any other misfortune loss or damage which may happen in the execution of the aforesaid trust, or otherwise in relation thereto, unless the same shall happen by or through their own wilful defaults respectively. And also that they my said trustees and executors, and such new trustees as may be so hereafter appointed as aforesaid, and each and every of them, their and each and every of their executors administrators and assigns, shall and may out of the monies which shall come to their respective hands, by virtue of the trusts aforesaid, retain to and reimburse himself and themselves, and allow to his and their co-trustees and co-trustee all costs charges and expenses which they or any of them may respectively sustain expend or be put unto, in or about the execution of the trusts aforesaid, or in anywise relating thereto. And, lastly, I do hereby revoke all former and other wills by me at any time heretofore made.

## No. 12.

*A Will equally dividing the Testator's whole substance between his two Sons, being his only Children, subject to a Provision for his Widow.*

**THIS** is the last will and testament of me, H. L. C., of \_\_\_\_\_, &c. Esq. My soul I humbly recommend (1) to the mercy of Almighty God; and I desire that my body may be

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(1) Of late years it has been the fashion, for there is a fashion even in the last acts of a man's life, to omit these solemn preambles. I confess myself an approver of them, as believing it to be useful to the surviving relatives of the testator to draw their attention to the tremendous consequences of the separation of soul and body, at a season of impressibility and reflection.

A gentleman has put into my hands a will of one of the Judges, made just after the restoration, the preamble of which seems to me to be affecting and interesting.

In the name of God, Amen, I, Thomas L., of, &c. one of the Barons of his Majesty's Court of Exchequer, finding myself oppressed with many infirmities of body, through age and suffering in these latter times, which puts me in remembrance that I have no long time to continue in this life, and that it is my duty to settle and dispose of that small remainder of estate which it has pleased God in his mercy and goodness to preserve to me, when so many virtuous men have lost all their possessions through the calamities of these unhappy times, do make this my last will and testament. First, I commend my soul to the Lord of life, trusting that through the merits and satisfaction of his Son I shall obtain pardon for my many transgressions; and that, having finished these days of misery and mortality, I shall inherit everlasting quiet; and I give my body to the earth, whereof it was made, to be decently interred, without any superfluous charge or expense, in humble hope that it will rise a glorious body at the general resurrection.

By the following extract from the will of the late Mr. Burke, it will be seen that his sentiments on this point coincided with those above expressed.

“ First, according to the ancient, good, and laudable custom, of which  
 “ my heart and understanding recognize the propriety, I bequeath my  
 “ soul to God, hoping for his mercy through the only merits of our Lord  
 “ and Saviour Jesus Christ. My body I desire, if I should die in any place  
 “ very convenient for its transport thither (but not otherwise), to be buried  
 “ in the church, at Beaconsfield, near to the bodies of my dearest brother  
 “ and my dearest son, in all humility praying that, as we have lived in  
 “ perfect unity together, we may together have a part in the resurrection  
 “ of the just.”



interred, without any unnecessary pomp or expense, in such spot as my executors may think convenient and proper for that purpose. In the first place, I charge all my estate and effects, of every description, with the payment of my debts, funeral and testamentary expenses, and such legacies as I shall hereinafter bequeath; and subject thereto, I give devise and bequeath unto my friends R. and S. all my messuages farms lands estates and hereditaments, with the appurtenances, wheresoever situate; and also all my personal estate and effects whatsoever and wheresoever, to and to the use of them the said R. and S., their heirs executors administrators and assigns for ever, upon the trusts, nevertheless, and to and for the intents and purposes, and with under and subject to the several powers, provisos, limitations, and declarations hereinafter limited, expressed, and declared, of and concerning the same respectively, (that is to say,) upon trust, that they or the survivor of them, or the heirs executors administrators, or assigns of such survivor, as long as they or he shall continue to receive the rents, issues, and profits, of any of my said houses tenements and hereditaments, under the dispositions of this my will, or any of them, do see that the same are kept in all substantial and necessary repair, and that the same, or such as have usually been insured from damage by fire, be still kept insured to such value and amount as has been usual with regard to the same respectively, taking care that the expense of such repairs or insurances fall respectively upon the person or persons beneficially interested in the same under the provisions of this my will; and that in case any such loss or damage shall happen, the money to be received upon or by means of such insurance or insurances may be laid out in reinstating the same respectively, and do retain and apply so much of the rents and profits aforesaid as shall be necessary in that behalf respectively; and subject and without prejudice to such the aforesaid trusts, upon trust, out of so much of the said rents and profits of all my said messuages and tenements as shall remain unapplied to the purposes aforesaid, and out of all the rest of my estates and effects hereinbefore devised and bequeathed, to pay unto my wife E. C., or to such person or persons as she shall, by writing under her hand, appoint to receive the same, the yearly sum of 700*l.* of lawful money of Great Britain, as long as she shall live and continue my widow; and if she shall marry again, my will is, that the said annuity of 700*l.* shall be reduced to 300*l.* of like lawful money;

Testator gives all his property to trustees.

Upon trust out of the rents and profits of his messuages and hereditaments to keep them in good repair and insured from fire.

And to lay out the money received upon the insurances in reinstating the premises destroyed or damaged.

Then to pay an annuity to his wife, to be reduced on her marrying again.



And such reduced annuity to be paid to her exclusively of her husband, and not to be subject to his debts or engagements.

To pay other annuities.

And, subject to such trusts as aforesaid, to stand seised of the said estates and effects upon trust, as to certain premises, for the use and benefit of his eldest

the said annuities of 700*l.* or 300*l.*, as the case may happen, to be paid half-yearly by equal payments on every 24th day of June and 25th day of December in every year, and a proportionate part of such half-yearly payment (if any) as shall be accruing, and not have actually accrued due, at the time of her decease. The first payment of the said yearly sum of 700*l.* to commence and be made to her on the first of those days which shall happen after my decease, and the first payment of the said yearly sum of 300*l.* to begin and take place on the first of those days which shall happen after such subsequent marriage of my said wife. And my will is with respect to the last-mentioned annuity or yearly sum of 300*l.*; that the same may be paid into the hands of the said E. C., or unto such person or persons as she shall appoint, exclusively of any such after-taken husband, who is not to intermeddle therewith, nor is the same or any part thereof to be subject in any manner to such husband's control, debts, or engagements. And I will and declare that the receipts of my said wife, or of such person or persons as she shall appoint to receive the said annuity, or the arrears thereof, shall, notwithstanding any such coverture, be good and effectual releases and discharges for the same or so much thereof as shall therein be expressed to have been received. And I further desire that my said trustees, or the trustees or trustee for the time being, out of the rents, issues, profits, and proceeds of all my said estates and effects, real and personal, but subject to all and every the trusts aforesaid, and to the annuity hereinbefore directed to be paid to, or to the appointment of, my said wife, do and shall pay unto my sister G. C. widow of, &c. or to such person or persons as she shall by writing under her hand appoint to receive the same during her life, the yearly sum of 50*l.* of lawful money of Great Britain, by equal half-yearly payments, on the 24th day of June, and the 25th day of December, in every year, the first payment to commence and be made on the first of those days which shall take place after my death; and also do and shall out of the same rents, issues, profits, and proceeds, but subject and without prejudice to the aforesaid trusts and to the said annuities, pay unto my niece C. L., or unto such person or persons as she shall, by writing under her hand, appoint to receive the same, during her life, the yearly sum of 70*l.* of like lawful money, by like half-yearly payments, and the first payment thereof to be made on the same day as before-mentioned in respect to the annuity given to my said sister

G. C.; and subject to the several trusts and annuities aforesaid, do and shall stand and be seised and possessed of all and every my aforesaid real and personal estate so devised and bequeathed to my said trustees as aforesaid, upon the trusts following, (that is to say) as to my said hereinbefore-mentioned hereditaments and premises, situate at L. in the county of K., and at B. and C., in the county of R., for the sole benefit of my eldest son T. C., his heirs and assigns for ever. And as to all the residue of my property hereinbefore devised and bequeathed as aforesaid, in trust for the sole benefit of my son J. C. his heirs, executors, administrators and assigns, for ever. And I do hereby authorize and request the said trustees or trustee for the time being, so to pay and provide for the payment of the said several annuities hereinbefore made payable out of my general property as before-mentioned, as that the beneficial shares of my said two sons, T. C. and J. C., be made contributory to and operated with such payments in equal proportions, or as nearly equal as circumstances will permit, or can conveniently be done; and for facilitating such purpose and the general objects of my will, to keep separate accounts of the rents profits and proceeds of the said beneficial shares. And I do hereby also direct, that until my said sons shall respectively attain the age of 24 years, my said trustees or trustee for the time being shall receive all the rents, profits, and proceeds of all my said estates, property, and effects, and out of the surplus which shall remain in their hands after discharging the said trusts and paying the said annuities, and all arrears thereof, pay and allow out of their said respective beneficial shares for the maintenance and education of my said sons, until they respectively shall attain the age of 21, any annual sum, not exceeding 200*l.* per annum; and after they shall have attained the age respectively of 21 years, and until they shall respectively have completed the 24th year of their age, any annual sum, not exceeding 300*l.* according to the opinion of their guardians, of the wants of their respective situations. And I hereby appoint my said wife, E. C., together with the said R. and S., the guardians of my said children, and commit wholly to them, and their love and prudence, the education and management of my said two sons, only that to either or each of my said sons, electing to pursue one of the three learned professions, divinity, law, or physic, and with their or his own consent and express inclination, fixed as a student in either of our two English universities, I request my trustees or trustee, for the time being, to advance and pay

son, and as to all his other estates and effects, for the use and benefit of another son.

To contribute equally to the said annuities.

Separate accounts to be kept of the distinct shares.

Provision for the education and support of his two sons, out of their respective shares.

Their education confided to their mother and trustees, who are appointed guardians.

The universities and learned and liberal professions recommended.

over and above such suitable allowance as aforesaid, the gross sum of 100*l.* in order to enable him or them to purchase a competent collection of books, which sum of money I request the said guardians of my said children to see laid out in the purchase of such books only as are proper and safe to be perused and studied by them. And I desire it to be understood to be my wish and desire, that my said sons should follow liberal and learned professions, and receive an academical education at the university of Oxford or Cambridge. And I declare my will to be, that my said sons, as and when they shall severally have attained the age of 24 years, shall respectively become entitled to receive the entire rents, profits, and proceeds of their respective shares of the said trust property, to which they will be entitled, under and by virtue of this my will, subject, and without prejudice to the interests, charges, annuities, and trusts hereinbefore mentioned. And I do hereby direct that as and when my said sons shall severally have completed the said age of 24 years, if the said several annuities hereinbefore bequeathed shall previous to that time have ceased to become payable, or as soon after their severally attaining that age as the aforesaid annuities shall cease to become payable under this my will, the said R. and S., or the survivor of them, or the heirs executors or administrators of such survivor, shall convey, assign, transfer, pay and make over, by proper and effectual conveyances, transfers, payments, and assurances in the law, to such of my said sons as shall have so completed the 24th year of his age, all the legal estate and interest of and in his share of the surplus of my said real and personal property, estate, and effects, remaining after the discharge of the aforesaid trust, and payment and satisfaction of the said several annuities, charges, and allowances, in the manner hereinbefore mentioned. And furthermore, my will is, that when, and as soon as either of my said sons shall have completed the 24th year of his age, if he shall consent to give such security, and execute such deeds and assurances, as to the satisfaction of the said trustees or trustee, for the time being, shall sufficiently bind and secure the regular payment of his proportional contribution towards the said several annuities hereinbefore bequeathed, the legal estate of and in the said several species and kinds of property, constituting such his said share above given to him, or intended so to be, (subject, and without prejudice to any of the hereinbefore mentioned beneficial interests and charges,) shall forthwith be transferred and made over to him, his heirs executors administrators and

And when the sons shall have attained 24, then upon their giving security for the payment of the annuities, their shares, to be conveyed to them absolutely.

assigns, absolutely for ever. And I do hereby further declare my will to be, that if either of my said sons shall happen to depart this life, before he shall attain 24 years of age, (2) and without having been married, all his aforesaid beneficial estate and interest, given to or intended for him by this my will, remaining after the full discharge of such payments and arrears, as are hereby charged upon the same, or the same is hereby in any wise made liable to, and subject to such of them as shall still be payable thereout, or charged thereupon, shall go and belong to the surviving brother, and be subject to such and the same provisos, restrictions, and powers, to which all my said property and effects have hereinbefore been made liable. And in case both my said sons shall depart this life before they shall attain the 24th year of their age, and unmarried, my will is, that the said R. and S., or the survivor of them, or the heirs executors and administrators of each survivor, do and shall, with the consent of the said E. C., if she be then living, and if she be dead, of their or his own proper authority, sell and dispose of all the said property hereinbefore devised to them, both real and personal, either together or in parcels, by public auction or private contract, for the best price or prices in money which can be reasonably obtained for the same, and convey the same accordingly. And I will and declare, that the receipt or receipts of my said trustees, or the trustees or trustee for the time being, shall be a sufficient discharge or discharges to the purchaser or purchasers thereof, or of any part thereof, for the money for which the same, or any part thereof, shall be so sold as aforesaid, and such purchaser or purchasers, his her or their heirs, executors, administrators or assigns, or any of them, shall not be answerable for any loss, non-application, or misapplication of such purchase-

In case either dies before 24, his share to survive.

And in case both sons shall die before 24, the trustees are to sell all the trust estates and effects, and vest the produce in the funds, and stand possessed thereof upon trust, to pay the interest and dividends to his wife for life, and after her death, to transfer and pay the principal to such persons, in such shares, &c. as testator shall appoint, and in default of appointment to and among testator's next of kin.

Of the interest of the devisee in remainder, where the devisee for life dies before the testator.

The limitation over to the survivors, after a devise to persons as tenants in common, prevents a lapse.

(2) If real or personal property be given to A., and if A. die before a certain age, then to B., upon A.'s dying before the age mentioned, in the life of the testator, the devise or bequest does not lapse, but will operate immediately on the testator's death, for the benefit of B. *Northey v. Strange*, 1 P. Wms. 342. Upon the same principle of construction, where property is given to several persons, as tenants in common, the clause, extending the bounty to survivors, is of use to prevent a lapse; and the word *survivors* will not make the interest a joint tenancy, if the intent to make a tenancy in common appear by the will. Thus, if the devise be to A., B., and C., to be *equally divided between them*, and the survivors and survivor of them, it is a tenancy in common, by virtue of the words *equally between them*; and the words *survivors and survivor of them* are to be understood of such of them as shall be living at the testator's death. See 1 P. Wms. 7. note.

money, or any part thereof. And I give and bequeath the money arising from such sale or sales to the said R. and S., their executors, administrators and assigns, upon trust that they, or the survivors or survivor of them, or the executors or administrators of such survivor, do and shall place out and invest the same in or upon any of the parliamentary stocks or funds of Great Britain, and do and shall vary and transpose such stocks for other securities of the like nature when and so often as it shall seem meet to them, and do and shall pay the interest and dividends of the same unto my said wife E. C., as long as she shall live, or to such person or persons as she shall appoint to receive the same; and from and immediately after her decease, upon trust that they, the said trustees, or the trustees or trustee for the time being, do and shall pay or transfer all such principal monies, stocks, funds and securities, unto such persons, in such parts shares and proportions, at such days and times, and with under and subject to such powers, restrictions, limitations over and conditions, as I may hereinafter direct or appoint in any future will, codicil, testamentary paper, or other writing under my hand; and in case I shall make no such direction or appointment in respect thereof, or shall dispose only of part thereof, then my will is, that my said trustees or the trustee for the time being do and shall dispose of all such the said principal monies, stocks, funds and securities, or so much thereof as shall remain unappointed and undisposed of by me, by any subsequent will or codicil, or testamentary paper, or other writing as aforesaid, to and amongst my nearest kindred, precisely in the manner in which the statute made for the distribution of intestates' effects would have disposed of my personal property in case of my dying wholly intestate. And I give to the said R. and S., whom I also constitute and appoint executors of this my last will and testament, full power, with the privity consent and approbation of my said wife, if she shall be living, and if she shall be dead, then of their own authority to sell and dispose of any part of my said personal estate and chattels real, for the most money that can be obtained for the same, if they shall deem such sale or disposal to be for the benefit of my said personal estate, until my said son, J. C., who is to become entitled thereto under this my will, shall have attained his age of 24 years. And I request them, as such executors, to call in any debts due to me upon bond or otherwise, but so nevertheless as to give a reasonable time to my bond debtors to discharge the same respectively, provided the interest be regularly paid, and the principal be not imme-

Trustees empowered to sell and dispose of any part of the personal estate which it may appear to them to be for the benefit of the younger son to dispose of, until he shall have attained the age of 24, and have the full possession of his share under the will. The proceeds to be laid out in stock, to accumulate till the son is entitled.



diately wanted for the purposes and provisions of this my will, or some or one of them. And my will is, that all such part of my personal estate, and the growing proceeds thereof, as likewise the rents, issues, and profits of all my real and leasehold estates, remaining in the hands of my said trustees or the trustee for the time being, after discharging all the said several trusts, and keeping down the said several annuities above granted, as shall not be wholly in the disposition of one of my said sons, by virtue of the beneficial estate and interest hereinbefore given to him, until the same shall be in the actual possession and disposition of my said sons respectively, by virtue of the provisions of this my will, or some or one of them, shall be invested and laid out in the purchase of stock, in such of our public and parliamentary funds, as the said trustees or trustee shall think most advantageous and desirable, and be permitted and caused to accumulate in the nature of compound interest, until the capital shall, by virtue of some or one of the aforesaid provisions of this my will, be respectively transferable to the persons beneficially entitled to it under the above dispositions, for the benefit of such his estate and interest; provided always, that the said trustees or trustee as aforesaid do and shall keep distinct and separate accounts of the stock to be purchased as aforesaid, so as to correspond with and relate to the distinct titles and shares of my said sons, under my will as aforesaid.

And I further desire and direct, that if either of my said sons, having completed the 21st year of his age, shall be in treaty for a marriage, becoming his condition, education, and family, and such as shall be fully approved of by my said wife, if she be then living, and the other guardian or guardians appointed by this will, and if such guardians shall be then all dead, by the said trustees or trustee for the time being, he may be enabled, notwithstanding he may be under the age of 24, by the said trustees or trustee, to make a suitable legal settlement of all or some part of his share of the real or personal property to which he will be entitled under this my will, upon such intended marriage, the terms and provisions of which settlement shall be in his own discretion: provided only that he enters into such bonds and covenants, and executes such reasonable other assurances, as shall be deemed by the said trustees or trustee as aforesaid sufficient to bind and secure to the persons entitled to any annuities or benefits out of, or charged upon his said share or division of my testamentary property, the full and regular payment and satisfaction thereof. And it is my will, that upon such marriage,

If either of his sons shall be in treaty for a suitable marriage before 24, with the consent of his mother and guardians, trustees are to enable him to make a suitable settlement.

If testator's wife should claim her settled jointure, then she is to take no benefit under the will.

with such consent, and at such age as aforesaid, of either of my said sons, he shall have all the benefit and priviledges which have hereinbefore been provided for him on his attaining the age of 24; and that the whole property given to him by this my will shall upon the said annuities and charges being secured, as aforesaid, ultimately and absolutely vest in him, discharged of the said contingency of survivorship in the other brother. And I declare my will to be, that if my said wife, E. C., shall insist upon receiving her jointure of 300*l.* per annum, which was settled upon her by our marriage settlement, bearing date the 19th day of February, 1772, and secured by way of rent charge upon some of the hereditaments and premises above devised to my said trustees, upon the trusts hereinbefore mentioned, she shall take no benefit under this my will; but the same, as far as respects any provision for her, or disposition in her favour, shall be void, and of no manner of effect: and in the event of her attempting to enforce her claims to such jointure, or any part thereof, by any of the powers or remedies given to her, or her trustees, by the said settlement for that purpose, I do direct that in every such case the trustees or trustee for the time being, under this my will, do and shall, instead of paying to my said wife the annuity or annuities hereinbefore provided for her, or any part thereof, make such disposition of the rents and profits of my said estates, hereby devised to them, and which they are hereby empowered to receive, as that my eldest son, for whose share the estates charged with the said jointure are hereinbefore intended, may receive a complete indemnification, and the just proportion between my two sons, as to the benefit to be derived to them under this my will, may be equally preserved and maintained. [The proper clauses for the safety and indemnity of the trustees.]

And, lastly, I do hereby solemnly revoke all former wills and testaments at any time heretofore by me made, and declare this only to be my last will and testament.



## No. 13.

*A Will, comprising directions for a Settlement of freehold, copyhold, and leasehold estates, with various limitations, and gifts of annuities and rent charges; containing also bequests of chattels, and sums of money.*

I, J. W., of ———, do make this my last will and testament, in manner and form following. I desire to be decently interred at ———, at the discretion of ———, my executors hereinafter named; and I give and bequeath unto my wife A. all my household goods and furniture, plate, jewels, watches, linen, china, pictures, books, and wearing apparel of what nature or kind soever, as well at my town residence, as at my residence at ——— aforesaid; and also all my coach-horses, saddle-horses, coach, chaise, and other carriages, and the harness, saddles, bridles, furniture, and other things belonging, and appurtenant thereto, together with the live and dead stock, farming utensils, and implements of husbandry whatsoever, which shall be at or upon or about my estate at ——— aforesaid, at the time of my decease, to and for her own proper use absolutely, for ever. Also I confirm to her, my said wife, the surrender made to her use, for life, of my copyhold estate at ———. And I do hereby give and devise unto her, my said wife, all my freehold estate, with the appurtenances at ———, and ———, aforesaid, to hold the same to and for the use of her, and her assigns, for and during the term of her natural life, (if she shall so long continue my widow,) she keeping the same in repair, and paying the quit rents (if any) and taxes: and I give to her, during the continuance of her respective estates, full power to grant leases of the said freehold premises, and also of the said copyhold premises, so far as the custom of the manor will allow, for any term or terms, not exceeding three years, in possession, and not in reversion, so as the best improved rents be reserved incident to the reversion, without taking any fine, and the lessees be not made dispunishable for waste, and so as there be contained therein a proviso for re-

His furniture, plate, pictures, books, &c. to his wife absolutely.

Confirms an estate before settled upon her, and adds a further life-estate on other premises.

With a power of leasing.

All the residue  
of his estates,  
of all kinds to  
trustees.

To raise, by  
sale or mort-  
gage, such  
sums as shall  
be sufficient  
to make good  
any deficiency  
of the perso-  
nal estate, in  
paying the le-  
gacies, debts,  
&c.

Their receipts  
to be dis-  
charges.

entry for non-payment of the rents thereby reserved, and so as such lessees do execute counterparts of such leases, and covenant for the due payment of such rents. And as to for and concerning the remainder or reversion of the said copyhold estate, so surrendered to the use of my said wife for her life, expectant on her decease; and as to the said freehold premises hereinbefore given to her during her widowhood, from and immediately after her decease, or second marriage, which shall first happen, and also as to and concerning all other my manors, messuages, farms, lands, tenements, and hereditaments, situate and being in the said county of ———, and in the counties of ——— and ———, or elsewhere, freehold, copyhold, and leasehold, whether in possession, reversion, remainder, or expectancy, whereof I have power to dispose, I give, devise, and bequeath the same, and all my estate and interest therein respectively, unto and to the use of my wife, A., and my friends ——— and ———, according to the nature of the same estates respectively; upon the trusts, nevertheless, and for the intents and purposes, and with under and subject to the powers, provisos, and declarations hereinafter expressed and declared of and concerning the same respectively, (that is to say) upon trust, that they, the said trustees or the survivor or survivors of them, or the heirs executors administrators or assigns of such survivor, do and shall, by sale or mortgage, demise, or other disposition of the same several estates and premises, or a competent part thereof, or by with and out of the rents issues and profits to arise therefrom in the mean-time, or by all or any of the aforesaid, or by such other ways and means as to them him or her shall seem meet, raise and levy such sum or sums of money as shall be sufficient to make good the deficiency of my personal estate, not specifically bequeathed, in answering and satisfying my debts, legacies, annuities, and funeral and testamentary charges: and for facilitating such sale or sales, mortgage or mortgages, I will and declare that the receipt or receipts of the said ——— and ———, or the survivors or survivor of them, or the heirs executors, administrators or assigns of such survivor, shall be a sufficient discharge or discharges for the purchase or mortgage money, agreed to be paid or advanced either by way of purchase or loan, for or upon my said several estates and premises, or any part or parts thereof respectively; and my will is, that the person or persons paying or lending the same, his her or their heirs, executors, administrators or assigns, shall not be liable to answer any loss, misapplication, or non-application thereof

respectively ; and, subject and without prejudice to the aforesaid trust, I will and direct that the said trustees or trustee for the time being do and shall stand and be seised and possessed of my said several freehold, copyhold, and leasehold estates and premises, or so much thereof respectively, as may remain unsold, upon the following trusts, (that is to say) as to my freehold estates and premises, upon trust, to convey, settle, and assure the same, subject to any such mortgage or mortgages as may be so made as aforesaid, to the uses hereinafter mentioned, or so many of them as at the time of such settlement shall be subsisting or capable of taking effect, that is to say, to the use intent and purpose that my said wife may receive thereout one annuity or yearly rent-charge of ——.l. clear of all taxes and without deduction, for her life, to and for her own sole and separate use and benefit, (over and above all other provisions which I have made for her) but, nevertheless, I do hereby declare, that the provisions hereby made or intended for and in trust for my said wife, shall be accepted by her as and for her jointure, and in lieu and full satisfaction of all dower and thirds, or free bench to which she is can or may or otherwise might be, entitled out of all or any of my estates at the common law, or by custom : and to the use and intent that B., the wife of —, may receive one annuity or clear yearly rent-charge of ——.l. for her life, clear of taxes and without deductions, for satisfaction of the like yearly sum to the payment of which to her I am liable : and to the use and intent that my said trustees and their heirs may receive thereout, upon the trusts hereinafter expressed, the following annuities or yearly rent charges, clear of taxes and without deductions, for the life of Jane W., daughter of —, that is to say, so long as she shall be under the age of 21 years, and unmarried, the clear annuity or rent-charge of ——.l.; and after she shall have attained the said age, then the clear annuity or rent-charge of ——.l. so long as she shall continue unmarried; and after her marriage, the clear annuity, or yearly rent-charge of ——.l. for the remainder of her life; in trust, to apply the said annuity or rent-charge of ——.l. during its continuance, for or towards her maintenance and education, the said annuity of ——.l. during its continuance, to her for her absolute use, and that of ——.l. during its continuance into her proper hands, or to her appointee or appointees in writing under her hand, to the intent that the same may be for her sole and separate use, exclusively of her husband for the time being, and may not be subject to his power or controul, debts, or engagements, and

To remain seised and possessed of such and so much of the said estates as should not be sold for the said purposes, upon trust, to convey and settle the same to the uses after-mentioned, viz. to the intent that his wife may receive an annuity over and above the provisions already made for her, to be in lieu of dower.

To the use and intent that B. may receive an annuity of ——.l.

And to the further use and intent that the trustees may receive an annuity for the life of J. W. (that is to say) during her minority ——.l. from that time till marriage ——.l. and after her marriage ——.l.; to apply the said annual sum of ——.l. during its continuance for her maintenance; the second sum of ——.l. during its continuance to be paid to her for her absolute use, and the third sum of ——.l. to be paid to her for her separate

use, exclusively of her husband.

And to the use and intent that the several other persons afternamed may receive the several annuities or rent charges aftermentioned for their respective lives, (that is to say) that J. R. may receive, &c.

And subject thereto, and to the powers and remedies for recovery thereof, to the use of testator's son and sons successively in tail male, remainder to his daughters as

for which the receipts of her, or her appointee or appointees, shall be effectual discharges, notwithstanding her coverture. And to the use and intent that the several other persons hereinafter named may receive out of the same premises the several annuities or yearly rent-charges hereinafter mentioned, for their respective lives, clear of taxes and without deductions, that is to say, my sister, J. R., one annuity or yearly rent-charge of —l. for her life; H. D. (husband of my late sister, M. D.) one annuity or yearly rent-charge of —l. for his life; my niece M. A. (daughter of my said late sister) one annuity or yearly rent-charge of —l. for her life; my niece E. B. (daughter of my late sister E. S.) one annuity or yearly rent-charge of —l. for her life; E. B. (son of my said niece E. B.) one annuity or yearly rent-charge of —l. for his life; my niece J. M. (the wife of T. M.) one annuity or yearly rent-charge of —l. for her life; my niece I. M. (the wife of J. M.) one annuity or yearly rent-charge of —l. for her life; E. B. (my wife's brother) one annuity or yearly rent-charge of —l. for his life; A. B. (my wife's sister) one annuity or yearly rent-charge of —l. for her life; E. A. (daughter of N. J. deceased) one annuity or yearly rent-charge of —l. for her life; E. W. (my late housekeeper) one annuity or yearly rent-charge of —l. for her life; and J. P. one annuity or yearly rent-charge of —l. for his life; all the said several annuities or yearly rent-charges hereinbefore directed to be paid out of, and charged upon, the said estates and premises in such settlement to be comprised, to be paid to the said annuitants respectively, by equal quarterly payments, (that is to say) on the 25th day of March, the 24th day of June, the 29th day of September, and the 25th day of December in every year; the first quarterly payment of the said annuities respectively to begin and be made on the first of the said quarter days that shall happen next after my decease, with powers of distress and entry upon and perception of the rents and profits of the same premises, to be limited and reserved to the said several annuitants in the usual manner, for better securing and compelling the payment of the said several annuities or yearly rent-charges. And as to the said estates and premises so to be charged, and subject thereto, and to such powers and remedies for recovery thereof as aforesaid, to the use of the first, second, third, fourth, fifth, sixth, and all and every other the son and sons of my body, lawfully issuing, (whether born in my life-time or after my death) severally and successively, and in remainder one after another,

as they shall be in priority of birth, in tail male; remainder to the use of all and every the daughter and daughters of my body, lawfully issuing, (whether born in my life-time or after my death) in tail general, to take as tenants in common if more than one, with cross remainders among them as tenants in common if more than one, in like tail general; remainder to the heirs of my body, lawfully issuing; and for default of such issue, to the use of W. W. (son of W. W. late of —, deceased) and his assigns, for his life, without impeachment of waste; remainder to the use of my said trustees and their heirs, during his life, in trust, by the usual ways and means, to preserve the contingent uses and estates, in such settlement after to be limited, from being defeated or destroyed, but to permit him and his assigns to receive and take the rents, issues, and profits of the said estates and premises, during his life, to his and their own use; remainder to the use of the first, second, third, fourth, fifth, sixth, and all and every other the son and sons of the body of the said W. W. the son, severally and successively, and in remainder, one after another, according to their priority of birth, in tail male; remainder to the use of my said trustees and their heirs, during the life of my nephew J. J. upon the trusts hereinafter declared concerning the same; remainder to the use of the first, second, third, fourth, fifth, sixth, and all and every other the son and sons of the body of my said nephew J. J. severally and successively, and in remainder, one after another, according to their priority of birth, in tail male; remainder to the use of trustees and their heirs, during the life of my niece, J. M., upon the trusts hereinafter declared concerning the same; remainder to the use of the first, second, third, fourth, fifth, sixth, and all and every other the son and sons of the body of the said J. M., severally and successively, and in remainder, one after another, according to their priority of birth, in tail male; remainder to the use of the said trustees and their heirs, during the life of L. W., upon the trusts hereinafter declared concerning the same; remainder to the use of the first, second, third, fourth, fifth, sixth, and all and every other the son and sons of the body of the said L. W., severally and successively, and in remainder, one after another, according to their priority of birth, in tail male; remainder to the use of the said trustees and their heirs, during the life of J. L., upon the trusts hereinafter declared concerning the same; remainder to the use of the first, second, third, fourth, fifth, sixth, and all and every other the son and sons of the body of the said J. L.,

tenants in tail with cross remainders. Remainder to the heirs of his own body. Remainder to W. W. for his life, and his children in strict settlement.

Remainder to the use of the trustees, during the life of J. J. upon the trusts after mentioned, and to the children of J. J. in succession in tail male.

Same limitations to others and their families.

And as to the uses and estates directed to be limited in such settlement to the said trustees, during the lives of the said J. J., J. M., L. W., J. L., and J. T., in trust, not only to preserve the contingent remainders therein to be limited, but to manage and improve the estates for the benefit of the persons next entitled.

Directions for the disposal and application

severally and successively, and in remainder one after another, according to their priority of birth, in tail male; remainder to the use of my trustees and their heirs, during the life of my said sister, J. T., upon the trusts hereinafter expressed and declared of and concerning the same; remainder to the use of all and every the daughters and daughter of the said J. T. lawfully begotten, or to be begotten; and of all my said brothers and sisters, lawfully begotten or to be begotten, in tail general, to take as tenants in common, if more than one, with cross-remainders among them as tenants in common, in like tail general; remainder or reversion to the use of my own right heirs. And as to the several and particular uses and estates hereby directed to be limited in such settlement, in remainder to the said trustees and their heirs, during the respective lives of the said J. J., J. M., L. W., J. L., and J. T., such uses and estates shall therein be declared to be so limited to the said trustees and their heirs, during the continuance of the same respectively, in trust, not only to preserve by the usual ways and means the several contingent remainders therein to be limited, but to manage and improve the said estates and premises, in such manner as to them the said trustees, or the trustees or trustee for the time being, shall seem meet, and to receive the rents issues and profits thereof, and to pay or apply the same, or so much thereof as shall remain, after retaining or discharging the expenses of repairs and improvements, and all taxes and other necessary outgoings, and the poundage, salaries, or wages of such person or persons, agent or agents, as they he or she may think fit to appoint or employ, to oversee, manage, and improve, and receive the rents, issues and profits of the said premises, to or for the benefit of such person or persons, as for the time being shall, under the limitations in such settlement, be entitled to the next estate of and in the said manors and premises therein comprised, expectant on the particular use or estate, for the time being, vested in possession in my said trustees or their heirs, in trust as aforesaid, but subject to a proviso to be inserted in such settlement, that if the person or persons for the time being, entitled to such next estate, or any of them, be a minor or minors, and unmarried, then during the period that such person or persons, or any of them, shall be a minor or minors, and continue unmarried, such part of the net rents, issues, and profits of the said premises as such unmarried minor or minors would be entitled to, if he she or they was or were married, or adult, shall be disposed of by the said



trustees or trustee for the time being, in the following manner, that is to say, any such yearly sum or sums, or such part thereof, as they he or she in their his or her discretion shall think necessary, not exceeding —*l.* per annum, shall be applied for or towards the maintenance and education of such minor, or for each of such minors, if more than one, until he or she shall attain the age of fourteen years; and after that age, and until he or she shall attain the age of eighteen years, or shall be married, any yearly sum or sums, not exceeding —*l.* per annum for such minor, or each such minor, and after the age of eighteen years, and until he or she shall attain the age of 21 years, or be married, any yearly sum or sums not exceeding —*l.* per annum, for such minor, or each such minor; and the surplus of such net rents and profits as such unmarried minor or minors would, if married or adult, be entitled to, remaining unapplied for the last-mentioned purpose shall, during such period, be considered as constituting part of my residuary personal estate, and be subject to the disposition hereinafter made thereof, and to all the trusts and powers in this my will contained respecting the same. And I will and direct that there shall be inserted in such settlement a power or proviso enabling the said W. W., as and when he shall be in the actual possession or entitled to the rents issues and profits of the said estates and premises so to be settled by deed or will, to grant, limit, settle, or appoint to, or to the use of, or in trust for, any woman or women, whom he shall happen to marry, (and that either before or after such marriage,) for and during the natural life or lives of such woman or women respectively, for her or their jointure or jointures, and in bar of her or their dower, to take effect immediately after his decease, any annual sum or yearly rent-charge, annual sums or rent-charges, not exceeding —*l.* by the year, tax-free and without any deduction, to be issuing out of, and to be charged and chargeable upon all or any part of the said estates and premises, with such powers and remedies for recovering the same when in arrear, and to create and limit such term or terms of years, for raising and better securing the same, as to him shall seem meet. And it is also my will, that in such settlement there shall be inserted a power or powers, enabling the said W. W., and also the trustees or trustee for the time being under such settlement, as and when they shall respectively be in the actual possession, or entitled to the receipt of the rents and profits, of my said manors, hereditaments, and premises, under the limitations

of the rents and profits, in case the persons so next entitled shall be minors.

To apply certain sums for their maintenance, varying with their respective ages.

The surplus of the said rents and profits in the mean time to fall into the residue of testator's personal estate.

Settlement to contain a power for the tenant for life to jointure anywoman he may marry.

And also a leasing power.



Settlement to contain a proviso for obliging the persons taking under the limitations to use the testator's surname.

Settlement to contain a proviso for empowering a change and substitution of trustees to be made from time to time.

therein contained, and also during the minority or minorities of any such child or children as may be entitled to the freehold and inheritance thereof, under such limitations as aforesaid, to make leases of all or any part of the said premises, for any term not exceeding 21 years in possession, and not in reversion, or by way of future interest, so as there be reserved in every such lease the best and most improved yearly rent, to be incident to the immediate reversion of the premises so to be demised, that can be reasonably had or gotten for the same, without taking any fine, premium or foregift for the making thereof, and so as there be contained in every such lease a condition of re-entry on non-payment of the rent thereby to be reserved, and so as the lessors execute counterparts thereof, and do thereby covenant for the due payment of the rents, to be thereby reserved, and be not made dispunishable for waste. And it is my will, that in such settlement there shall be inserted a proviso, condition or clause, enjoining the issue male of my said niece J. M. within six calendar months next after such issue male shall come into possession of the said estates and premises, under the limitations in such settlement, to assume, take, and use the surname of W. only, and to write and sign that surname only in or to all acts, deeds, and instruments, and on all other occasions, and for determining the estate tail of such issue, refusing or neglecting to comply with such condition, and limiting the said estates and premises over to those who may be next in remainder expectant on such estate tail under such settlement, or who would be entitled to the possession of the said premises under the limitations in such settlement, in case the tenant in tail male so refusing or neglecting were actually dead, without issue male. And my will further is, that such intended settlement shall contain a proviso that in case any of the trustees therein named, or any succeeding trustee or trustees in their or any of their place or places (whether introduced into the trusts therein contained by nomination or appointment as hereinafter mentioned, or by representation of any deceased trustee or trustees,) shall die, or desire to be discharged from, or refuse or neglect to act, or become incapable of acting in the execution of such trusts, or any of them, it shall be lawful for the surviving or other trustees or trustee for the time being (whether he she or they may have been created a trustee or trustees, by nomination or appointment, or have become so by representation as aforesaid,) by deed or instrument, under

hand and seal, attested by two or more witnesses, to nominate and appoint any other person or persons to be a trustee or trustees in the stead of the trustee or trustees so dying, desiring to be discharged, or refusing or neglecting to act, or becoming incapable of acting as aforesaid; and a clause making the usual provision for vesting the trust estates, real and personal, according to such nomination or appointment, and for giving the same its full effect, and enabling the new trustees or trustee to execute every trust and power which the old trustee or trustees might have exercised if such appointment had not taken place, either alone or in conjunction with the continuing trustee or trustees (if any) as the case shall happen; and also the usual clause for the indemnity of the trustees or trustee therein named, their heirs executors administrators and assigns, and for enabling them to act with safety in the execution of the trusts of such settlement, and such other clauses as are usual in settlements of the like kind. And as to for and concerning my said copyhold and leasehold estates and premises, or so much thereof as may remain unsold, for making good the deficiency of my personal estate not specifically bequeathed, in answering my debts, legacies, and funeral and testamentary charges, I will and direct that the said trustees, or the trustees or trustee for the time being, do and shall stand seised and possessed of the same respectively, (subject to any such mortgage or mortgages as may be made thereof as aforesaid,) upon such trusts, and for such intents and purposes as are hereinbefore directed to be limited or expressed, of and concerning the said freehold manors and premises therein to be comprised, and with under and subject to such and the same powers, provisos, conditions, limitations, and declarations as are directed to be contained therein concerning the same freehold manors and premises, or as near thereto as can or may be, and the rules of law and equity and the different natures of the estates and tenures will admit. Provided, that it shall be lawful for my said trustees, their executors, administrators and assigns, as and when they in their discretion shall think proper or see occasion, to renew the lease and leases of all or any part of my leasehold premises, and pay the fines and fees, and other expenses necessary to be paid for such renewal or renewals, out of any monies which may be in their hands by virtue of this my will, and to rebuild or repair all or any of the messuages or tenements, to be demised by such renewed lease or leases, (if such renewal shall be obtained on terms of rebuilding or repairing,) and to pay the expenses of such repairing or rebuild-

And the usual clauses of safety and indemnity to the trustees.

Trustees to stand seised and possessed of the copyhold and leasehold estates upon correspondent trusts.

Trustees to renew the leases as and when they shall think proper.

All the renewed leases to be vested in the trustees upon the same trusts.

Trustees to make leases in the mean time until the estates are sold, upon the same terms as above mentioned in respect to the leases to be made under the power for that purpose to be inserted in the settlement.

To appoint persons to oversee and manage the property, and to receive rents, and to allow them proper salaries.

Pecuniary legacies.

To his wife a sum for her immediate occasions.

To his executors for their trouble.

Advance of wages to servants.

ing, in like manner as I have directed with respect to the expenses of such renewals aforesaid; all which renewed leases shall be vested in them the said trustees, their executors administrators and assigns, upon the same trusts and for the same intents and purposes, and with under and subject to the same powers provisos conditions and declarations, as are contained and referred to in this my will concerning the present subsisting leases, or the premises therein comprised. Provided, and my will further is, that it shall be lawful for my said trustees, their heirs executors administrators and assigns, in the mean time, until such settlement of my said estates shall be made as hereinbefore directed, to make or grant leases of all my said freehold, and also of my said copyhold and leasehold manors and premises hereinbefore devised to them upon trust as aforesaid, which may be remaining unsold, for any term not exceeding 21 years in possession, reserving the improved rents, and without taking fines, and subject to the like restrictions as are mentioned with respect to leases to be made under the power of leasing directed to be inserted in the said intended settlement; and to appoint such persons as they shall think proper to oversee, manage, and improve my said estates and premises, and to receive the rents, issues, and profits thereof, and to pay or allow to, or permit such overseer or overseers, receiver or receivers, to retain such poundage, or sum or sums of money, by way of salary or wages, as my said trustees, or the trustees or trustee for the time being, shall think meet or reasonable. And I give the following legacies, (that is to say,) to my said wife —l. for mourning and her immediate occasions, and to my other executors and trustees above-named 100l. each, as a small acknowledgment for the trouble they will have in the execution of this my will. And I desire my executors to give mourning and one year's wages, (over and above what may be due for wages) to all such my servants as they in their discretion may think proper. And I give to my said nephew J. A. —l. to be paid to him at his age of 21; to D. C. —l.; to my nephew L. —l.; to my niece E. F. —l. at and when she shall arrive at her age of 21, or be married; to my nephew T. D. —l. at his age of 21, with interest in the mean time; to R. S. and J. F. —l. each, at their several ages of 21; and unto each of my nieces A. J. and J. S. —l.; unto E. and A. H. —l.; unto J. B., H. B., and C. B., children of my niece D. N. —l. each; all the said legacies to be paid to the respective legatees within 12 months after my decease, (save and except those given to my said wife, my said trustees and executors, and my servants,

which are to be paid immediately after my death). I give <sup>Legacies settled.</sup> unto the said Sarah S., the daughter of ———, the sum of —£. on the day of her marriage; and I give after her decease the said sum of —£. unto such child or children of her the said S. S. as shall attain the age of 21 years, to be divided among them (if more than one) in equal shares; and if but one, the whole to go to such one child as shall attain the said age. The portion or portions of such of them as may attain the said age, in the life-time of the said S. S., to be then a vested interest or vested interests, though not payable till after her death; and the interest of the presumptive portions of such of her children as may be under the said age at the time of her death, or so much thereof as shall be thought necessary, to be applied for or towards the maintenance and education of such infant child or children, until he she or they shall attain the said age; and the surplus dividends or interest which may not be applied for that purpose to accumulate and go along with the original share or shares; or in case there shall be no such children who shall attain the said age, such accumulations to fall together with the principal sum into my residuary personal estate. And I give unto J. W., daughter of my said nephew ———, 200£.; but the same not to be vested in or paid to her till she shall have attained the age of 21 years, and not to bear interest in the mean time. I give unto J. R. daughter of ———, 500£., but the same not to be vested in or paid to her till the age of 21 years, and not to bear interest in the mean time. I give unto J. B. eldest son of the said E. whom I have hitherto brought up and taken under my protection, —£. over and above what he may be entitled to as his share in the —£. hereinbefore given among the children of the said E. but the same not to be vested in or paid to him till his age of 21 years, and not to bear interest in the mean time. And unto such child or children of my said nephew I. J., (born in his life-time or after his death) as shall attain the age of 21 years, the sum of —£. to be divided between or among them, if more than one, share and share alike, and if but one then the whole to such one child as shall attain such age, and not to bear interest in the mean time. And after the decease of my said niece I M., I give unto such child or children of her, now in being or hereafter to be born, as shall live to attain the said age of 21 years, the sum of —£., the same to be divided between or among them (if more than one), share and share alike; and if but one, then the whole to such one child as shall attain the said age, and not to bear interest in the mean time, but the portions of such of them as shall attain

the age of 21 years in his life-time shall be then vested interests, though not payable until after her death, and after the decease of my said niece I. M. I give the sum of —l. to such child or children of her now in being, or hereafter to be born, as shall attain the age of 21 years, the same to be divided between or among them if more than one, share and share alike; and if but one, the whole to such one child as shall attain the said age, and not to bear interest in the mean time; but the portions of such of them as shall attain the said age in her life-time shall be then vested interests, though not payable till after her death. And I give after the decease of the said E., unto such child or children of him the said E., born in his lifetime or after his decease, as shall attain the age of 21 years, —l., the same to be divided among them, if more than one, in equal shares; and if but one, the whole to go to such one child as shall attain the said age, and not to bear interest; save that in case of the death of the said E., having a child or children under the age of 21 years, my will is, that my said trustees or trustee for the time being shall and may pay and apply any sum not exceeding the sum of 50l. per annum, by equal quarterly payments, for and towards the maintenance and education of such infant child or children, until he she or they shall attain the age of 21 years. And I will that the portions of such children of the said E. as shall attain the said age of 21 years in his lifetime shall be vested interests, though not payable till after his death. And as a further provision for the said E. B., whom I have hitherto brought up and taken under my protection, I empower my said trustees or trustee for the time being to apply such sum and sums of money (not exceeding —l. in the whole) for placing out the said E. B. apprentice to some profession or trade, as they the said trustees or trustee shall think proper, recommending to his choice the profession of ———, when and so soon as he shall arrive at a proper age for that purpose. And I declare that such sum or sums as may be thought fit to be applied for that purpose shall be considered as falling under the class of my pecuniary legacies. And I give and bequeath unto my said trustees and executors the exchequer annuity of —l. which I purchased for the life of my said niece I. M., my nominee, in trust, to pay and apply the same as she my said niece, notwithstanding her present or future coverture, shall by any note or writing under her hand direct or appoint; and in default at any time of such direction or appointment, then shall and do pay the same into her proper hands, for her own sole and separate use and benefit, to the intent that the

same annuity or any part thereof may not be subject to the debts, power, or control of her present or any future husband; and I declare that the receipt or receipts of her, or of the person or persons to whom she may direct the same to be paid, shall from time to time, notwithstanding her coverture, be a sufficient discharge or discharges for the said annuity, or so much thereof as in such receipt or receipts shall be acknowledged or expressed to be received. And I release to \_\_\_\_\_ the debt secured to me by his bond, and a judgment thereon, and desire my executors to deliver to him the said bond to be cancelled, and to acknowledge satisfaction on the judgment at his costs. And I give all the goods and fixtures belonging to me, and now at or upon my farms and lands in \_\_\_\_\_, in the occupation of \_\_\_\_\_, unto \_\_\_\_\_, to and for his own use, without any account to be rendered by him to my executors, in respect thereof; which bequest, together with the legacy of \_\_\_\_\_/ hereinafore given to him, I consider as sufficient, having heretofore amply advanced him. And I give and bequeath all the rest and residue of my personal estate and effects, of what nature or kind soever the same may be, unto my said trustees, their heirs executors administrators and assigns, upon trust, that my said trustees, or the trustees or trustee for the time being, do and shall invest the same in the purchase of manors, messuages, lands, tenements or hereditaments, of a clear and indefeasible estate of inheritance in fee-simple, in possession, to be situate or arising somewhere in England; and do and shall convey, settle, and assure such manors, messuages, lands, tenements or hereditaments, as may be so purchased, to such and the same uses, upon such and the same trusts, and for such and the same intents and purposes, and with under and subject to such and the same powers, provisos, limitations and declarations, as are hereinafore directed to be limited expressed or declared in and by such settlement as aforesaid, of and concerning such of the freehold manors and hereditaments devised by this my will, as are intended to be comprised in the same settlement, or such and so many of them as shall be then subsisting, undetermined, or capable of taking effect. Provided, and my will is, that it shall be lawful for my said trustees, or the trustees or trustee for the time being, to place out my residuary personal estate, in the mean time, and from time to time, until a convenient purchase or purchases of lands or hereditaments can be found in the public funds, or upon government or real securities at interest, in their his or her names or name, and when and as often as it may be thought

Residue of the personal estate to be laid out in the purchase of other estates to be settled as before directed concerning the before devised estates.

The same to be placed out in the funds until convenient purchases can be made, with power to vary and transpose the securities.



The interest and dividends to go as the rents of the purchased estates would go if purchased.

Power for change and substitution of the trustees under the will,

prudent or proper to call in the principal money so placed out, or to sell and transfer such funds or securities, and to reinvest the principal money so called in, or arising by such sale or transfer in or upon any new or other funds or securities of the like kind, and so from time to time to vary alter or transpose all such funds or securities for others of the same nature, so often as it may be thought meet. And my will is, that the dividends and interest arising from all such principal money, funds, and securities, shall, from time to time, go and be paid to such person or persons, and be applied for such intents and purposes, as the rents and profits of the lands or hereditaments, to be purchased therewith, and settled as aforesaid, would go or be payable, or applicable unto, in case such purchase and settlement were actually made. Provided, and my will further is, that when and so often as any of them, the said, &c. my said trustees hereby appointed, or any succeeding trustee or trustees, (whether introduced into the trusts of this my will, or any of them, by nomination or appointment under this present power, or by representation of any deceased trustee or trustees,) shall die, or refuse or neglect to act, or be desirous to be discharged from, or become incapable of acting in the execution of the said trusts, or any of them, it shall and may be lawful for the surviving or other trustees or trustee, for the time being, whether introduced into such trusts by nomination or appointment, or by representation as aforesaid, by any deed or writing, deeds or writings, under his her or their hand and seal, or hands and seals, attested by two or more credible witnesses, to nominate and appoint any other person or persons to be a trustee or trustees for the purposes herein mentioned, or any of them, in the stead of such trustee or trustees so dying, or refusing or neglecting to act, or being desirous to be discharged as aforesaid. And the said trust estates, whether real or personal, shall upon, or so soon as conveniently may be after every such nomination or appointment, be conveyed, assigned, and transferred, so as that the same may be vested in such new trustee or trustees, (if any) their heirs executors administrators and assigns, according to the nature and quality thereof respectively. And if there shall be no continuing trustee, then wholly in such new trustee or trustees, as the case may happen, and his or their heirs executors administrators and assigns, according to the nature and quality thereof respectively, upon the trusts, and for the intents and purposes, and with under and subject to the powers provisions and declarations expressed or declared concerning



the same respectively by this my will, or such and so many of them as shall be then subsisting, or capable of taking effect; and every such new trustee, his heirs executors administrators and assigns, shall have and be invested with every power and authority hereby delegated to the trustees herein named, either alone, or in conjunction with such former trustees or trustee, as the case shall, be. Provided also, that my said trustees respectively, for the time being, shall be charged and chargeable only with such monies as they respectively shall have actually received, and that one of them shall not be answerable or accountable for the other, or for the acts receipts neglects or defaults of the other of them, but each only for his her or their own acts, receipts, neglects, or defaults; neither shall they, my said trustees, for the time being, be answerable or accountable for any misfortune, loss, or damage, that may happen, of or to the said trust estates, monies, and premises, or any part thereof, except the same shall happen by or through his her or their wilful default respectively. And also, that my said trustees for the time being, and each of them their and each of their heirs, executors, administrators, and assigns, shall and may by and out of the monies that shall come to their respective hands by virtue of the trusts aforesaid, retain to and reimburse herself himself and themselves respectively, and allow to his her or their co-trustee or co-trustees, all such costs, charges, and expenses, as they either or any of them shall or may respectively sustain, expend, disburse, or be put unto, in or about the execution of the trusts hereby in them reposed, or in any wise relating thereto. And I appoint \_\_\_\_\_, \_\_\_\_\_, and \_\_\_\_\_, executrix and executors of this my will. And I also appoint them, and the survivor and survivors of them, guardian and guardians of such child or children as I may have, whether born in my life, or after my decease, during their respective minorities. And I revoke all former and other wills by me at any time heretofore made, and declare this only to be my last will and testament. In witness, &c.

## No. 14.

*A Merchant's Will providing for the continuance of his trade, under the management of his executors, for the benefit of his family, and for the future introduction of his sons into the business.*

Executors  
within a month  
after testator's  
interment to  
make an in-  
ventory of all  
his estate and  
effects.

Debts and fu-  
neral and tes-  
tamentary  
charges to be  
paid out of  
the personal  
estate.

Annuity to the  
wife, *durante*  
*viduitate*, over  
and above the  
settled provi-  
sion.

THIS is the last will and testament of me, \_\_\_\_\_ of \_\_\_\_\_.

I direct that my executors, hereinafter named, do and shall, within one month after my interment, cause an accurate inventory to be taken of all and singular my estate and effects of every nature or kind whatsoever, whether real or personal, and that five fair copies thereof shall be transcribed and signed by all my said executors, and that one of the said copies so signed as aforesaid shall be delivered to each of my said executors, for his own use. And I will and direct that all such debts as I shall justly owe at the time of my decease, together with the expenses of my funeral, and the probate of this my will, and the execution thereof, be fully paid and satisfied by my said executors, out of my personal estate. I give and bequeath to my dear wife, S. T., the sum of 100*l.* to be paid to her immediately after my decease; and to each of my children, who shall be then living, the sum of 20*l.*, to be applied by their mother, for their immediate use in mourning and necessaries. I give and bequeath unto my said wife, S. T., over and above the estates which are already settled upon her, situate &c. one annuity or yearly sum of 400*l.* for and during the term of her life, in case she shall so long continue my widow; and I do hereby direct that the same shall be charged upon the interest to arise, accrue, or be paid, as hereinafter is mentioned, from or by the capital to be employed in my trade or business of \_\_\_\_\_, which is to be carried on by my said executors, according to the directions hereinafter for that purpose given: and that the said annuity of 400*l.* shall be paid to her, my said wife, by four equal quarterly payments, on Lady-day, Midsummer day, Michaelmas-day, and Christmas-day, in every year, the first payment thereof to begin and be made on such of the said days as shall next happen after my decease. But in case my said wife shall marry again, at any

time after my decease, then and in such case, I revoke the said bequest of the said annuity of 400*l.* hereinbefore given to her, and direct that the same shall, from thenceforth, cease and determine; and instead thereof, I give and bequeath unto — and —, one annuity or yearly sum of 300*l.*, for and during the remainder of the natural life of my said wife, subject nevertheless to the proviso hereinafter contained, for determining the same, to be charged upon the interest to arise, accrue, or be paid, as hereinafter is mentioned, from the capital employed in my said trade or business, and to be payable at or upon the like four equal quarterly days of payment as aforesaid, that is to say, Lady-day, Midsummer-day, Michaelmas-day, and Christmas-day, in every year : and the first payment of the said annuity of 300*l.* to begin and be made on such of the said days as shall first and next happen after such second marriage of my said wife ; upon trust, nevertheless, that they, the said trustees, or the survivors or survivor of them, or the executors or administrators of such survivor, do and shall pay the said last-mentioned annuity of 300*l.*, from time to time, as and when the same shall become due and payable, and be received by them as aforesaid, unto my said wife, S. T., in the manner hereinafter expressed. And I hereby direct and declare, that the said annuity of 300*l.* or any part thereof, shall not be subject, or in any manner liable to the debts, control, engagements, or intermeddling of any husband, with whom my said wife shall hereafter happen to intermarry, but that the same shall, from time to time, be paid into her hands, to and for her own separate use and benefit, and not into the hands of any other person or persons whomsoever. And that the receipt and receipts of my said wife, under her hand alone, notwithstanding her coverture, shall from time to time be a good and sufficient discharge, and good and sufficient discharges, to my said trustees for so much of the last mentioned annuity, as in such receipt or receipts shall be acknowledged or expressed to have been received. And my will is, that it shall and may be lawful to and for my said wife, in case she shall continue my widow until the time of her decease, (but not otherwise) in and by her last will and testament in writing, to be by her signed and published in the presence of, and attested by two or more credible witnesses, to give bequeath and dispose of the sum of 5000*l.* to be charged and chargeable upon, and raised and paid out of the residue of my personal estate, unto such person or persons, in such parts, shares, and proportions, and in such manner and form as she shall

In case of her second marriage, the annuity to be reduced and paid to her separate use.

Power to the wife to dispose by will of 5000*l.* to be paid out of the residue of the personal estate ; to be reduced to 2000*l.* upon her marrying again.

Power to the wife to reside in the dwelling-house.

Annual sums to be applied out of the interest of the capital of the business, for the maintenance of testator's daughters, varying with their ages.

To invest 5000*l.* as each daughter comes

think fit. But in case my said wife shall marry again at any time after my decease, it shall and may be lawful to and for my said wife by her last will and testament, to be executed and attested in such manner as aforesaid, to give, bequeath, and dispose of the sum of 2000*l.* only, to be in like manner charged, and chargeable upon, and raised and paid out of the residue of my said personal estate, unto such person or persons, in such parts, shares, and proportions, and in such manner and form, as she shall think fit; and I do hereby charge and make chargeable the residue of my personal estate and effects, with the payment of the said sum of 5000*l.* to the legatee or legatees thereof, to be named in the last will and testament of my said wife, in case she shall continue my widow until the time of her decease; or in case of her marrying again, then with the payment of the said sum of 2000*l.* to the legatee or legatees thereof accordingly. And my will is, that my said wife shall and may reside in the house wherein I now dwell, situate at \_\_\_\_\_ aforesaid; in case she shall think proper so to do, and shall and may have and enjoy the use of all my furniture, plate, linen, china, and glass, which shall be therein at the time of my decease, during her life, if she shall so long continue my widow, but not otherwise. And in case she shall think proper to quit the said house, at any time after my decease, then I give and bequeath unto her, my said wife, the sum of 500*l.*, in order to settle her in and furnish for her any other habitation she may choose to reside in. And it is my will and mind, and I do hereby direct that the sum of 60*l.* per annum shall be allowed and paid out of the interest to arise and accrue, from or by the capital to be employed in my said trade or business of \_\_\_\_\_, to be carried on by my said executors, as hereinafter mentioned, for the maintenance and education of each of my daughters, E. S., and M.; and also the like sum of 60*l.* per annum for the maintenance and education of each and every other daughter I may hereafter have, until my said daughters, E. S., and M., and my said other daughters, shall respectively, attain the said age of 12 years. And that from and after their respectively attaining the age of 12 years, the sum of 100*l.* per annum shall be allowed and paid out of the said interest to arise or accrue as aforesaid, for the maintenance and education of each and every of my said daughters, until they respectively shall attain the age of 21 years, in case they shall so long continue sole and unmarried, but not otherwise. And my will is, and I do hereby direct that the said trustees, or the survivors or survivor of them, or

the executors or administrators of such survivor, do and shall, as and when each of them my said daughters E. S., and M., and as and when each and every such other daughter, as I may hereafter have, shall respectively attain the age of 21 years, or marry with the consent of my trustees or trustee for the time being, or the major part or equal number of them, by and out of my personal estate, lay out and invest the sum of 5000*l.* in the parliamentary stocks or funds of Great Britain, in their his or her own names or name; and that they the said trustees or the survivors or survivor of them, or the executors or administrators of such survivor, do and shall stand and be possessed of and interested in the stocks, funds, or securities, so to be purchased as aforesaid; upon the trusts, and to and for the intents and purposes hereinafter expressed and declared of and concerning the same, (that is to say) upon trust to pay to or otherwise sufficiently authorize and empower every such daughter so attaining the said age of 21 years, to have, receive, and take the interest, dividends, and annual produce of the stocks, funds, or securities so to be purchased with one of the said sums of 5000*l.* during her life, for her own separate use and benefit, and so as the same or any part thereof shall not be subject or in any manner liable to the debts, control, engagements, or intermeddling of any husband whom such daughter may happen to marry. And my will is, and I do hereby expressly direct and declare that the receipt and receipts of every such daughter under her hand shall, notwithstanding her coverture, be a good and sufficient discharge to my said trustees or trustee for the time being, for so much of the said dividends, interest, or annual produce, as in such receipt or receipts shall be acknowledged or expressed to have been received. Provided always, and I do hereby declare my will and mind to be, that it shall not be lawful for my said daughters respectively to charge, sell, assign, or otherwise dispose, by way of anticipation, of the interest, dividends, and annual produce so to them respectively payable as aforesaid, and that notwithstanding such charge, sale, assignment, or other disposition, it may and shall be lawful to and for my said trustees, or the trustees or trustee for the time being; and they he and she is and are hereby required, to pay the said interest, dividends, and annual produce, into the proper hands of my said daughters respectively for their respective, separate, and peculiar use and benefit upon their own respective receipts. And my will is, and I do hereby direct, that from and after the decease of every such

of age; and to pay the interest to her for life, for her separate use.

Proviso against assigning or anticipating.

To and among the children of daughter, and the issue of children born in the life-time of the daughter, as the daughter shall appoint.

Education and maintenance out of the interest of the respective portions. The residue to accumulate.

daughter, they my said trustees, or the survivors or survivor of them, or the executors or administrators of such survivor, do and shall stand and be possessed of, and interested in the said stocks funds or securities so to be purchased with the said sum of 5000*l.* the interest, dividends, and annual produce whereof are hereinbefore directed to be paid for life to such daughter so dying as aforesaid, upon the trusts, and to and for the intents and purposes hereinafter expressed and declared concerning the same, that is to say, in trust for all and every or such one or more exclusively of the children of such my daughter, or in trust for all and every or such one or more exclusively of the issue, born in the life-time of such my daughter, of any such child or children, or both, in such manner, with such provisions for their respective maintenance or education, and if more than one such child or issue, in such shares and proportions as such my daughter respectively by any deed or deeds, or instrument or instruments, in writing, to be by her sealed and delivered, or by her last will and testament to be by her signed and published as aforesaid, shall from time to time direct or appoint. And in default of appointment of the same under the power hereinbefore contained, or so far as such appointment shall not extend, and subject to the trusts hereinbefore declared of the same, upon trust for all and every the child and children of such my daughter, who being a son or sons shall attain the age of 21 years, or being a daughter or daughters shall attain that age, or marry with such consent as aforesaid, equally to be divided between or amongst them, if more than one, share and share alike; and if but one such child, then for such one child. And my further will is, and I do hereby direct, that in default of appointment respectively as aforesaid, after every such my respective daughter's decease, the dividends and interest, and annual produce of the stocks, funds, or securities on which the said 5000*l.* shall have been invested, and to which such daughter shall have been entitled, or so much as shall be thought necessary by my said trustees or the trustees or trustee for the time being, of the said dividends, interest, and annual produce, shall be applied in for and towards the maintenance and education of such her child or children during his her or their respective minorities: and the residue thereof shall be invested in or upon such securities as aforesaid, and accumulated in the way of compound interest; and that such accumulations shall be in trust for the persons who, under the trusts hereinbefore or hereinafter declared,



shall become absolutely entitled to the funds whence such accumulations shall have proceeded. And in case any such my daughter shall have no child, who being a son, shall attain the age of 21 years, or daughter who shall attain that age, or marry with such consent as aforesaid, then and in such case, and in default of appointment respectively as aforesaid, in trust that my said trustees, or the survivors or survivor of them, or the executors or administrators of such survivor, do and shall stand and be possessed of and interested in the said stocks, funds, and securities, the interest dividends and annual produce whereof is hereinbefore directed to be paid to such my daughter for her life as aforesaid, in trust for such person or persons, in such shares and proportions, and in such manner and form, as such daughter shall by any deed or deeds, or instrument or instruments, in writing, to be by her sealed and delivered, or in and by her last will and testament in writing to be by her executed and attested in such manner as aforesaid, direct, limit, or appoint; and for want of such direction limitation or appointment, and as to so much or such part thereof whereof no such direction limitation or appointment shall be made, upon trust for my said wife, if she shall be then living and shall have continued my widow, and all and every my children now born or hereafter to be born, who being a son or sons shall attain the age of 21 years, or being a daughter or daughters shall attain that age, or marry with the consent of my trustees or trustee for the time being, or the major part or equal number of them, to be divided between or amongst my said widow and children, share and share alike: but in case my said wife shall be then dead, or shall not till then have continued my widow, upon trust, for all and every my children now born or hereafter to be born, who being a son or sons shall attain the age of 21 years, or being a daughter or daughters, shall attain that age, or marry with such consent as aforesaid, to be divided between or among them, if more than one, share and share alike; and if but one such child, then the whole to be in trust for that one child; and if I shall have no child, then the whole to be in trust for my wife, if she shall be then living, and shall have continued my widow as aforesaid. And my will is, and I do hereby direct, that the sum of 70*l.* per annum shall be allowed and paid out of the interest to arise or accrue as hereinafter is mentioned, from or by the capital employed in my said trade or business to be carried on by my said executors as hereinafter is mentioned, for the maintenance and education of each of my sons now born, or hereafter to be born, until they shall

And if no child of any of his daughters shall live to attain 21, then to such persons as the daughter shall appoint.

And in default of appointment to go to and among his widow and children, in case his widow shall not have married again; and if she shall have married again, then among the children only.

An annual sum to be applied out of the interest of the capital to be employed in the business, to and for the maintenance and education of testator's



sons; to vary  
in amount  
with their ages

Testator's  
trade to be  
carried on by  
his executors.

To be carried  
on by the exe-  
cutors till the  
youngest son  
shall have at-  
tained 21.

The executors  
to have an  
annual sum  
for their trou-  
ble.

Executors to  
make up a full  
account of all  
the stock and

respectively attain the age of 12 years; and from and after their respectively attaining that age, that the sum of 100*l.* per annum shall be allowed and paid out of the interest to arise or accrue as aforesaid, for the maintenance and education of each of my said sons now born or hereafter to be born, until they shall respectively attain the age of 21 years. And whereas I think it will be advantageous to my sons that the trade or business, which I now carry on at — aforesaid, shall be continued after my decease, and preserved for them or such of them as may choose to carry on the same, when they shall attain a proper age; and I am therefore desirous of giving my said wife and my said trustees hereinafter named full power to continue and carry on the same in such manner as is hereinafter mentioned: now I do for that purpose give and bequeath all my capital and stock in trade, and all my cash, debts, and effects which shall be employed in or belonging to the said trade or business at the time of my decease, unto my said wife and the said trustees, their executors administrators and assigns, upon the trusts, and to and for the intents and purposes hereinafter expressed and declared concerning the same, (that is to say) upon trust, that they my said wife, and the said (trustees), and the survivors and survivor of them, and the executors or administrators of such survivor, may and shall carry on the said trade or business of a —, for the term or time, and in the manner hereinafter-mentioned, (that is to say) if all my sons, W., F., T., and G., shall attain the age of 21 years, then until the youngest of my said sons shall attain the age of 21 years: but if all of them shall not live to attain the age of 21 years, then until the last of them attaining the age of 21 years shall actually attain that age, or for such further or longer period as may be necessary for the purpose of performing the trusts hereby in them reposed concerning the said trade or business. And I give and bequeath unto such of them the said (trustees) as shall prove this my will, and act in the execution of the trusts thereof, but not otherwise, for his trouble therein, the annual sum of — *l.* to commence and be computed from the time of my decease, and continue until my second son for the time being shall attain the age of 22 years, the same to be paid annually, and after the same rate for any less time than a year that shall happen of the period between the time of my decease, and such my second son's attaining the age of 22 years as aforesaid. And my will is, and I do hereby direct, that they the said (trustees) and the survivors and survivor of them, and the exe-

cutors or administrators of such survivor, do and shall, immediately after my decease, cause a full true and just account in writing to be made and taken of all the capital, stock, and cash employed in the trade aforesaid, and all the debts and things which shall be then belonging, due and owing to the said trade, and of all such debts as shall be due or owing from or by the said trade to any person or persons; and do and shall cause a just valuation and appraisement to be made of all the particulars in the said account, in order that the net amount of the capital then employed in the said trade may clearly appear; and that my said trustees, and the survivors and survivor of them, and the executors or administrators of such survivor, do and shall, on ——— next after my decease, or within one calendar month then next following, and so yearly and every year whilst the said trade shall be carried on by them in pursuance of the powers herein for that purpose contained, on the same day, or within one calendar month next afterwards, cause to be made up and stated a full and accurate account, statement and adjustment of the accounts of the said trade, and shall and do cause to be made and taken a like account in writing of all the stock monies debts and other things which shall be then belonging due or owing to the said trade, and of all such debts as shall be due or owing from or by the said trade to any person or persons whomsoever, and do and shall cause a just valuation and appraisement to be made of all the particulars included in such account; and that the profits and gains which shall arise, or be made from or by the said trade, shall in the first place be liable to answer interest after the rate of 5*l.* per cent. per annum, upon the net amount of the capital in cash and effects, which shall be from time to time employed in the said trade, including the debts owing to the trade, of which interest a distinct account shall be kept; and out of such interest my said wife shall have and be paid the annuity hereinbefore given to her, or in trust for her as aforesaid; and the said several sums hereinbefore directed to be allowed and paid, for the maintenance and education of my said sons and daughters respectively, shall be allowed deducted and paid; and subject thereto respectively, the said interest shall from time to time be laid out in or invested upon the parliamentary stocks or public funds of Great Britain, or at interest upon government securities in England, to be from time to time altered and varied at the discretion of my said trustees, or the trustees or trustee for the time being, so that the same

cash employed in the trade, and of the debts due to or from the same, and to have all the property in the trade valued, that the amount of the net capital may appear. And to make out a yearly account.

The profits of the trade in the first place to answer the interest of 5*l.* per cent. per annum upon the net amount of the capital employed. The annuity to the wife, and the several sums before directed to be allowed and paid, to come out of this interest. And subject to such trusts, to invest the residue of such interest in the funds or government securities, to accumulate in the way of compound interest, until divided amongst the sons.

This division to be in equal shares, one moiety to be paid as they respectively arrive at the age of 21; and the other moiety, with the intermediate accumulations, as they arrive at the age of 25.

The overplus of the profits, after answering such interest upon the capital, to be added to the capital employed in the business.

Shares of the sons to survive.

and the resulting income and produce thereof may be accumulated in the way of compound interest, until the same shall be divided amongst my sons, as well those already born as those hereafter to be born, in the manner next hereinafter mentioned, (that is to say) the same shall be divided into as many shares as I shall have sons already born or hereafter to be born; and when each of my said sons shall attain the age of 21 years, he shall have and be entitled to one of such shares, and the same shall be paid to him as follows, (that is to say) one moiety or half part of such share immediately on his attaining the age of 21 years, and the other moiety or half part of such share, together with the intermediate accumulations of such moiety, on his attaining the age of 25 years; and each of such my said sons shall, from and after his attaining his age of 21 years, also have and receive a proportionable part or share of the gains to arise or accrue on the said capital, after payment of the said annuity to his mother, and the several sums hereinbefore directed to be allowed and paid thereout as aforesaid. And I do hereby declare my will and mind to be, that the overplus of the said profits and gains, after answering interest upon the said capital as aforesaid, shall from time to time be added to the said capital, and shall be therewith employed in carrying on the said trade or business as hereinbefore directed. Provided always, that in case any of my said sons shall depart this life under the age of 21 years, then and in such case, and so often as the same shall happen, the part or share of such son so dying, of and in the money so directed to be raised for interest, and so to be invested and accumulated as aforesaid, and also the future interest to accrue for the same, shall be paid to and amongst the survivors or others of them, if more than one, share and share alike; and if more than one of my said sons shall depart this life under the age of 21 years, then and in such case, and so often as the same shall happen, the surviving or accruing share or shares to which such son or sons would, on attaining the age of 21 years, have become entitled under the clause last hereinbefore mentioned, shall again survive and accrue to the survivors or survivor, or others or other of them my said sons, in equal shares and proportions if more than one; and in case all of them save one shall happen to die under the age of 21 years, then as well the whole of the interest so to be invested and accumulated as the whole of such profits and gains to belong to such one or only son, and to be an interest vested in him on his attaining the age of 21 years, and to be paid to him at the respective times and in manner aforesaid.

And my will is, that when my said son W. shall attain the age of 21 years, he shall become and be admitted a partner in the said trade, if he shall think proper, and shall in such case have and be entitled, during the partnership, to one-fourth of the profits and gains which, after answering such interest as aforesaid while the same shall continue payable, may or shall arise or be made in the said trade after his admission as such partner therein; and my will also is, that when my son F. shall attain the age of 21 years, he shall become and be admitted a partner in the said trade, if he shall think proper, and shall in such case have and be entitled, during the partnership, to one-fourth part of the profits and gain which, after answering the said interest, shall arise or be made in the said trade after his admission as a partner therein; and my further will is, and I do hereby declare, that when my son T. shall attain the age of 21 years, he shall become and be admitted a partner in the said trade, if he shall think proper, and shall in such case have and be entitled, during the partnership to one-fourth part or share of the profits and gains which, after answering the said interest, shall arise or be made in the said trade after his admission as a partner therein; and further my will is, that when my son G. shall attain the age of 21 years, he shall become and be admitted a partner in the said trade, if he shall think proper, and shall in such case be entitled, during the partnership, to one-fourth part of the profits and gains which shall, after answering the said interest, arise after his admission as a partner therein. And my will is, and I do hereby direct, that all my said sons shall, within the space of one year next after they shall respectively attain the age of 21 years, determine and elect whether they will become partners in the said trade or not; and in case they determine and elect to become partners therein, they shall within that time respectively notify such their election and determination, by writing, under their respective hands, to my said trustees, or the survivors or survivor of them, or the executors or administrators of such survivor, or otherwise they shall be considered as having refused to become partners therein. Provided always, and my will is, that in case my trustees or trustee for the time being, or the major part of them, shall, from the conduct of any or either of my sons who shall become and be a partner or partners as aforesaid, while any of the trusts of this my will, respecting the said trade, shall remain unperformed, be of opinion that it will be injurious to the trade then carried on, and to the rest of the partners therein, that such son or sons should any longer continue a partner or partners in the said trade, that then and in such

Each son attaining 21 to be admitted a partner, and to be entitled to a fourth.

The sons to make their election as they come of age, to enter into the business or not.

Proviso empowering the trustees to remove from the business any son whose conduct proves him to be unqualified.

And such son so excluded or refusing shall have the legacy and provision after mentioned.

Such son to have a legacy of 4000*l.* and his original but not accruing share in the interest of 5 per cent. upon the capital aforesaid.

All the profits and gains of the business, after answering the objects aforesaid, to belong to the survivors of those dying under 21, continuing in the business, and to such as elect to be in and continue in the business, exclusively of those who refuse or withdraw.

case it shall be lawful to and for my said trustees, or the trustees or trustee for the time being, or the major part of them, and he and they shall have full power and authority immediately to dissolve the partnership, so far as respects such son or sons, and such son or sons shall thenceforth be no longer a partner or partners in the said trade, but from and after such dissolution of the said partnership, or dismissal therefrom, shall have and be entitled to such legacy and legacies and provision, as is hereinafter made for such of my said sons as shall neglect or refuse to become a partner or partners in the said trade or business, any thing hereinbefore contained to the contrary thereof in anywise notwithstanding. And my further will is, and I do hereby direct, that in case any of my said sons W., F., T., and G., shall refuse to become partners or a partner in the said trade, within the time aforesaid, then every of such sons so refusing to become a partner in the said trade, shall, upon his attaining the age of 22 years, (but not unless he attains that age) have and receive, from and out of the capital then employed therein, the sum of 4000*l.* to and for his and their own use and benefit; and every of such sons shall nevertheless be entitled to and shall have and receive his original share of the interest which shall have arisen or accrued from or by the said capital employed in the said trade, up to the time of his attaining the age of 21 years, the same to be paid and payable at the time and in the manner hereinbefore mentioned, but shall not be entitled to any further part or share thereof, by way of survivorship or accruer, on the death of any other or others of my said sons. And I also declare my will and mind to be, that in case any of my said sons W., F., T., and G., shall depart this life under the age of 21 years, or shall refuse to become a partner in the said trade within the time aforesaid, or withdraw himself therefrom after his admission as a partner therein, then and in such case the survivors and survivor of them my said sons, W., F., T., and G., who shall elect to become such partner or partners in the said trade, in the manner and upon the terms aforesaid, shall have and be entitled to in equal shares and proportions the whole of the share or shares to which such son or sons so dying under the age of 21 years, or declining to become a partner or partners in the said trade, or withdrawing himself therefrom, would either originally or by survivorship or accruer have been entitled, of the profits and gains which, after deducting such interests as aforesaid, shall arise or be made in the said trade or business, after their respective admission as partners therein. And in case all my said sons but one shall happen to depart



this life under the age of 21 years, or shall refuse to become partners in the said trade, then and in such case such one who shall elect to come into the said trade in order to carry on the same in partnership as aforesaid, shall have and be entitled to the whole of the profits and gains which shall arise or be made in the said trade, after his admission to the same, (after answering and paying thereout interest upon the net amount of the capital employed in the said trade, and also paying unto such of his brothers as shall refuse or decline to carry on the said trade in partnership, or shall withdraw himself from the said trade after his admission as a partner therein, one-sixteenth part of such profits and gains, until such brother shall attain the age of — years, or depart this life, provided such brother shall not carry on the same trade within the weekly bills of mortality as hereinafter is mentioned;) and such one son who shall elect to come into the said trade in order to carry on the same in partnership, and shall continue therein, shall and may thenceforth, and subject as aforesaid, carry on the said trade to and for his own use and benefit. And my will is, and I do hereby direct, that the firm or stile by which the said trade shall be carried on, until one or more of my said sons shall be admitted therein, shall be “———,” and after the admission of one or more of my said sons therein the same shall be “——— and Son,” or “——— and Sons,” as the case may be. And my will is, and I do hereby direct, that in case all or any of my said sons shall refuse or decline (within the respective times before limited) to carry on the said trade or business in partnership, upon the terms and in the manner hereinbefore mentioned, then I do hereby direct, that every such son, so refusing or declining to carry on the said trade or business, shall have and be entitled to one-sixteenth part or share of the clear profits or gains thereof, until they shall respectively attain the age of — years, or depart this life, which shall first happen; and in case any of my said sons, who shall become a partner or partners in the said trade or business, shall at any time after his or their admission into the same, and before his or their attaining the age of — years, be desirous of withdrawing himself or themselves therefrom, then and in such case such son or sons so withdrawing himself or themselves from the said trade or business, shall have and be entitled to one-sixteenth part or share of the clear profits and gains thereof, until he or they shall attain the age of — years, or depart this life, which shall first happen. Provided always, that no such son or sons so refusing, declining, or with-

If only one son shall elect to be in the business, he is to pay one sixteenth of the profits to the others refusing until their attaining — years, or dying, provided they do not carry on the same trade within the weekly bills of mortality.

Future stile or firm of the partnership.

If all refuse or withdraw, they are to have each one sixteenth till of the age aforesaid, or death.

The sixteenth share to cease upon any of

them carrying on the same trade within the bills of mortality.

When all the children, being in the partnership, shall have reached 28, or be dead under that age, whilst in partnership, the trustees are to make up a general account of all the effects, and invest 20,000*l.* in the funds, and then distribute the residue into a number of shares equal to twice the number of children living to 28 years in the partnership, or dying in the partnership and leaving widows and children, and to give one share to the family of each son so dying under 28, in the business, and the remaining shares equally among those who have lived to attain 28, in the partnership business.

drawing himself or themselves, shall afterwards carry on the same trade within the weekly bills of mortality. But in case such son or sons so refusing, declining, or withdrawing as aforesaid, shall carry on or be concerned in the same trade within the bills of mortality, then and from thenceforth the said one-sixteenth part or share so directed to be paid to him shall cease and determine; and he or they shall not at any time thereafter have or be entitled to any share of the profits and gains of the said trade or business to be carried on by the other son or sons, in pursuance of this my will. And my will is, and I do hereby direct, that when all my said sons, W., F., T., and G., shall have attained the age of 28 years, in case they shall all of them have elected to become partners in the said trade, and none of them shall have withdrawn himself from the same, or in case any of my said sons shall have declined or refused to become partners or a partner in the said trade, or withdrawn themselves or himself therefrom, and have departed this life under the age of 28 years, and I shall have any other son or sons hereafter born who shall live to attain the age of 21 years, (in which case such after-born son or sons shall have the election of coming into the said trade, and being admitted a partner or partners therein, if he or they shall think proper, in the place of his brother or brothers who shall so decline or refuse to become a partner or partners therein, or withdraw himself therefrom, or die under the age of 28 years,) then and when such after-born son or sons, as shall so elect to come into and be a partner or partners in the said trade, shall have attained the age of 28 years, or have departed this life under that age, and being in partnership as aforesaid at the time of such death, my said trustees, or the survivors or survivor of them, or the executors or administrators of such survivor, do and shall make up state and settle a full and general account, in writing, of all the stock, monies, debts and effects, which shall be in or belonging or due or owing to the said trade or business, and shall and do cause a just valuation and appraisement to be made of all the particulars thereof, and do and shall in the first place (after raising and paying thereout the sum or sums of money hereinbefore mentioned, to each of my said sons and daughters, or such of them as shall have lived to become entitled thereto,) raise thereout the sum of 20,000*l.*, and lay out and invest the same in the purchase of a competent share or competent shares of the parliamentary stocks or funds of Great Britain, in their or his or her own names or name, and do and shall stand and be possessed of



and interested in the said stocks, funds and securities, to be purchased with the said sum of 20,000*l.*, upon the trusts, and to and for the intents and purposes hereinafter mentioned, expressed, and declared of and concerning the same; and after the said several sums so to be raised shall have been raised as aforesaid, and all the legacies hereby given and bequeathed shall be answered and paid, and subject thereto, then upon trust, that they my said trustees, or the survivors or survivor of them, and the executors or administrators of such survivor, do and shall part and divide all the residue and remainder of the said capital, stock, debts and effects which shall be in or belonging, or due or owing, to the said trade or business, into a number of shares, equal to twice the number of my sons now born, or hereafter to be born, who shall attain the age of 28 years and be then living, or who, while in partnership as aforesaid, shall have attained the age of 28 years, or die under that age, leaving a widow and a child, or children living at his decease, or born in due time after, or a widow only, living at his decease, or a child or children living at his decease, and no widow; and if all my said sons, so electing to be and remaining partners, shall attain the age of 28 years, the whole of the said capital stocks debts and effects shall be in trust for such my said sons, in equal shares and proportions; and if I shall have but one son electing to be and continuing a partner, who shall attain the age of 28 years, and no son who, being and continuing a partner as aforesaid, shall depart this life under that age, leaving a widow and a child or children living at his decease, or born in due time after, or leaving a widow only, or a child or children then living, and no widow, then the whole of the said capital, stock debts and effects, to be in trust for that one son; and if I shall have one or more son or sons, who, being a partner or partners, shall attain the age of 28 years, and one or more son or sons, who being and continuing a partner as aforesaid, shall die, leaving a widow and a child or children living at his or their decease, or respective deceases, or born in due time after, or leaving a widow only, or a child or children living at his or their decease, or respective deceases, but no widow, then if only one of my sons, being and continuing a partner as aforesaid, shall have left a widow and children, or a child living at his decease, or born in due time after, or have left a widow only, or a child or children only living at his decease, and no widow, one of the said shares shall be laid out and invested in the public funds, upon the trusts hereinafter expressed and declared, for the use and

benefit of the widow, and child or children of such one son, dying while such partner as aforesaid, and leaving such widow child or children as aforesaid; and if more than one of my said sons, being and continuing a partner as aforesaid, at the time of his death shall have left a widow and a child or children living at their respective deceases, or born in due time after, or a widow only, or a child or children living at his or their respective deceases and no widow, then as many of the said shares shall be so laid out and invested, upon the trusts hereinafter expressed, as I shall have sons, being or continuing a partner as aforesaid, at the time of their deaths, who shall have respectively left a widow, and a child or children living at their respective deceases, or born in due time after, or have left a widow only, or a child or children living at their respective deceases, and no widow, and the remainder of the said shares shall be divided between or amongst such of my said sons then living as shall have elected to become partners and shall have continued partners in the said trade to their respective age of 28 years, share and share alike; and if but one shall be then living, who shall have elected to enter into and carry on, and shall have continued in the said trade, and shall have attained the age of 28 years, then such one son shall have and be entitled to the remaining shares thereof, the part or share or parts or shares of such widow and child or children, respectively to be ascertained, according to the then last preceding annual settlement, and to be paid to my said trustees, or the survivors or survivor of them, or the executors or administrators of such survivor, upon trust that they the said trustees, or the trustees or trustee for the time being, do and shall place out and invest the same in the purchase of a competent share or competent shares of the parliamentary stocks or public funds of Great Britain, in their his or her own names or name, and do and shall stand and be possessed of the said stocks, funds and securities so to be purchased as aforesaid, upon such and the same trusts, for the benefit of such widow and children, and with such limitations over, for the benefit of my other sons and their widows and children, and subject to such powers and provisos as are hereinafter mentioned expressed and declared of and concerning the stocks or funds to be purchased with the said sum of 20,000*l.* hereinbefore directed to be invested as aforesaid, so far as such trusts relate to the widows and children of the sons, for whom or for whose widow and children the said sum of 20,000*l.* is intended to be invested, or as near thereto as circumstances will permit. Provided always, and in case I shall have no son, who, being a partner, shall attain

the age of 28 years, and be living at the time hereinbefore expressed to entitle him to such surplus or remaining shares, and I shall have two or more sons who shall become partners as aforesaid, and while in partnership shall die and leave a widow and a child or children living at his or their decease or respective deceases, or born in due time after, or leave a widow only, or a child or children living at his or their decease or respective deceases, and no widow, then it is my will that the widow and child or children, or widow only, or child or children of such deceased sons, shall, *per stirpes*, and not *per capita*, be entitled to have take and divide among them such surplus shares, in such proportions as shall be equal to the number of my sons who shall become partners as aforesaid, and while in partnership die, and leave such widow and child or children, or such widow only, or such child or children, and no widow as aforesaid, and so that such widow or widows, and child or children, may, in the proportions aforesaid, according to their stocks, husbands and parents, respectively, be entitled to the whole of the surplus shares between or among them, according to the trusts hereinafter declared, of their said several and respective proportions; and in case I shall have only one such son as last hereinbefore mentioned, then it is my will that such widow and child, or children, or such widow only, or child or children of such only son, shall be entitled to have and take such surplus shares, and the full and whole benefit of the same, as well as the other provisions hereby made for him her or them, according to the trusts hereinafter declared. And in case I shall have no son, who, being a partner as aforesaid, shall attain the age of twenty-eight years, and be living at the time hereinbefore expressed to entitle him to such surplus shares; nor any son who shall become a partner as aforesaid, and while in partnership as aforesaid, shall die, leaving such widow and child, or children only as aforesaid, then and in that case, all the residue and remainder of the said capital, stock, debts, and effects shall be in trust for all and every the children of my said daughters, who shall attain the age of 21 years, such children of my said daughters to take *per capita* and not *per stirpes*, in equal shares and proportions, if more than one; and if there shall be but one such child, the whole to be in trust for that one child; and if none of my daughters shall have a child that shall attain the age of 21 years, then in trust for all my nephews and nieces who shall be then living, and the survivor of them, his or her executors administrators and assigns. And I do hereby direct that my said trustees, and

And if no sons, or their families shall become entitled to these shares, then the whole remainder of the capital stock and effects of the business to go to the children of testator's daughters, *per capita*, and not *per stirpes*.

Trustees to stand possessed of the said sum of 20,000*l*.

In trust for the sons as tenants in common for their respective lives, and after their respective deceases in trust for their children respectively, in equal shares, *per stirpes*, with survivorship, respectively, subject to a provision for the widow of each such son.

Clause for maintenance and education.

the survivors and survivor of them, and the executors or administrators of such survivor, do and shall stand and be possessed of, and interested in, the said stocks funds and securities so to be purchased with the said sum of 20,000*l*. hereinbefore directed to be raised, upon the trusts, and to and for the intents and purposes hereinafter mentioned, expressed, and declared of and concerning the same, that is to say, upon trust for all my sons, as well those already born, as those hereafter to be born, in equal shares and proportions, during their respective lives, as tenants in common, and not as joint tenants; and after the decease of each such son, upon trust to pay to the widow of such deceased son out of the interests and dividends of such his share of the said last-mentioned stocks funds and securities, such annual sum not exceeding —*l*. per annum, as the said son shall, by writing under his hand and seal, and to be attested by two or more credible witnesses, or by his last will and testament, signed and published by him, in the presence of two or more such witnesses, have directed or appointed in that behalf; and subject to such annual payment as last aforesaid, upon trust for all and every the child and children of each such son, equally to be divided between or amongst the said children, share and share alike; and if but one, then in trust for such only child; the part or share, parts or shares, of such children or child to be an interest vested, or interests vested in, and be paid to him her or them, at his her or their age or respective ages of 21 years; and if any such children shall depart this life, under the age of 21 years, then as well the original part or share, parts or shares of him her or them so dying, as the part or share or parts or shares surviving or accruing, by virtue of this present clause, shall go and be paid to, the survivors or survivor, or others or other of the said children, and their respective executors, administrators, or assigns, to be an interest vested or interests vested in, and to be paid to, the child or children respectively entitled thereto, at such time or times as is hereinbefore mentioned, with respect to his her or their original share or shares. And I do hereby will and direct, that after the decease of such son, the interest dividends and annual produce of the share to which he shall be so entitled for his life, of the said sum of 20,000*l*., and the stocks, funds and securities in which the same shall be invested as aforesaid, or so much of the said interest, dividends and annual produce as my said trustees, for the time being, shall think necessary, shall after the decease of their respective fathers, and subject to any provisions made under the power for

purpose hereinbefore given by this my will, for the widows of their fathers respectively, be paid and applied for or towards the maintenance and education of such child or children in the mean time, until he she or they shall respectively attain the age of 21 years, and the residue invested in such stocks funds and securities as aforesaid, so as to accumulate in the way of compound interest; and that such residue, and the accumulations thereof, shall be in trust for the persons who, under this my will, shall become entitled to the fund whence such accumulation shall have proceeded. But in case any of my said sons shall, at the time of his or their respective decease, leave a widow only, and no child or children, him or them surviving, or there being such child or children, if all of them shall happen to die under the age of 21 years, then after the decease of such son or sons, as to the part or share, parts or shares, of such son or sons as shall so die, leaving a widow or widows, but no child or children, who shall live to attain the age of 21 years, upon trust for his or their widow or respective widows, during their respective natural lives, (if she or they shall so long continue sole and unmarried,) and in case any one or more of my said sons shall have no child who shall attain the age of 21 years, as aforesaid, then after his or their decease or respective deceases, (subject to the provisions made or to be made as aforesaid, for his or their widow or respective widows as aforesaid, in the share or shares to which such son or sons shall have been so originally entitled, for his or their life or lives respectively, as aforesaid,) the same, immediately after such his decease, to be subdivided into as many shares as there shall be sons of my body then living, or then dead, having left a child or children, and the said shares shall be upon such trusts for my said surviving other sons, and their children respectively, as are hereinbefore declared, in respect to their said respective original shares, and so after the decease of any other son or sons, under 21 years of age, the share or shares to which such last-mentioned son or sons shall, or if living, would, by survivorship or accruer, be so entitled for life as aforesaid, shall also be upon such trusts for the then surviving or the other sons, and their respective children, as are hereinbefore declared, as to their said respective original shares; and if only one of my said sons shall have a child who shall attain the age of 21 years, then after the decease of the other of my said sons, and such failure of issue of their bodies respectively as aforesaid, (and subject to the provisions hereinbefore and hereinafter contained for their

In case of the death of a son, leaving no children, but a widow only, in trust for her during her life, and subject to the widow's interest or provision, to go among the surviving sons and their families, with survivorship as to the accruing shares.

And in case all the sons shall die without leaving any child, who shall acquire a vested interest, then subject to the widow's interest, to go to the children of the testator's daughters, and if none of the daughters shall leave a child, who shall acquire a vested interest, then the interest of the whole to be for the wife of testator, *durante viduitate*, and upon her decease, to testator's nephews and nieces, their executors administrators and assigns.

Legacies to after-born sons, who are also to have equal shares in the 20,000*l.*

widows respectively,) the whole of the said sum of 20,000*l.* and the stocks funds and securities on which the same shall be invested, to be upon such trusts for such only son, and his child or children respectively, as hereinbefore is declared as to his original share of or in the same. And in case none of my said sons shall have a child who shall attain the age of 21 years, then as to the whole of the said stocks funds or securities hereinbefore directed to be purchased as aforesaid, (subject to the powers and provisions hereinbefore contained,) upon trust for all and every the children of my said daughters who shall attain the age of 21 years; such children of my said daughters to take *per capita*, and not *per stirpes*, in equal shares and proportions, if more than one; and if there shall be but one such child, the whole to be in trust for that one child. And if none of my daughters shall have a child who shall attain the age of 21 years, then upon trust to pay one equal half part of of the interest, dividends, and annual produce of the said sum of 20,000*l.*, and the stocks, funds and securities on which the same shall be invested, unto my said wife, during her life, in case she shall so long continue sole and unmarried, but without making any deduction out of her said annuity of —*l.*, in respect thereof, and subject thereto, do and shall stand and be possessed of and interested in the said trust monies, stocks, funds and securities, and the interest, dividends, and annual produce thereof, in trust for all my nephews and nieces who shall be then living, or the survivor of them, and the executors administrators and assigns of such survivor. Provided also, and my will is, that in case I shall have any other son or sons hereafter born, either in my lifetime, or in due time after my decease, then I give and bequeath unto every such after-born son 2000*l.*, to be an interest vested in and to be paid to him on his attaining the age of 21 years, and the sum of 4000*l.*, to be an interest in, and to be paid him upon his attaining the age of 24 years; and my will is, that every such after-born son, and his child and children (if any) shall have and be entitled to a share of the stocks funds and securities, to be purchased with the said sum of 20,000*l.*, hereinbefore directed to be invested as aforesaid, equally with my said sons, W., F., T., and G., and their children, the same to be payable, and paid at such time and times, and with under and subject to such and the same powers, provisos and limitations, and to be attended with the same right of survivorship, and in such and the same manner in all respects as the shares to or in trust for my said sons, W., F., T., and G., and their widows and child-



ren, of and in the same stocks, funds and securities as are hereinbefore directed, limited, given and bequeathed. Provided also, and my will is, that in case any of my said sons shall depart this life whilst in the said business, before he shall attain the age of 28 years, leaving either a widow and one or more child or children, him surviving, then, and in such case, as often as the same shall happen, I do hereby direct that such account and valuation as aforesaid shall be made, taken and settled, and that the part or share of such of my said sons so dying, of and in the said sum of 20,000*l.*, shall forthwith be raised, and laid out and invested in the purchase of a competent share or competent shares of the parliamentary stocks or public funds of Great Britain, in the names or name of my said trustees or trustee for the time being, upon such and the same trusts, for the benefit of his widow and child, and children, and subject to the same powers, provisos and limitations over, as are hereinbefore directed, and shall not wait till all my sons shall attain the said age of 28 years, any thing hereinbefore contained to the contrary thereof in anywise notwithstanding. And I direct, that in case all my sons shall refuse or decline to carry on the said trade or business, then, and in such case, I do hereby direct, that when all my said sons, W., F., T., and G., who shall live to attain the age of 28 years, shall have attained that age, and there shall be no after-born son or sons, or in case there shall be any after-born son or sons, when all my after-born sons who shall live to attain the age of 22 years shall have attained that age, the said trade, stock and effects employed therein, shall be sold to the best advantage, and the debts due and owing to the said trade shall be collected by my said executors, or the survivors or survivor of them, or the executors or administrators of such survivor. And from and immediately after such sale as last aforesaid, they, my said trustees, and the survivors and survivor of them, and the executors or administrators of such survivor, do and shall, by and out of the money which shall arise by such sale, and which shall be collected as aforesaid, lay out and invest the said sum of 20,000*l.* in the purchase of a competent share or competent shares of the parliamentary funds of Great Britain, in their own names, or in the names or name of the survivors or survivor of them, or of the executors or administrators of such survivor, upon the trusts, and to and for the intents and purposes hereinbefore mentioned expressed and declared of and concerning the same, and shall and do apply the residue of the money which shall arise by such sale or sales

Upon the death of any son in the business before 28, leaving a widow or children his share in the 20,000*l.* immediately to be raised and invested, and not to wait till the other son... or sons shall attain 28 years.

In case all the sons shall decline the business, then all the property and effects of the trade to be sold, and the 20,000*l.* to be raised and invested for the purposes aforesaid, and the residue of the money to be applied as the residue of the capital, stock, &c. are before directed to be applied.



And in case all the sons shall die under 21, the business to be sold, and the produce invested for testator's wife and daughters, and their children, and his nephews and nieces, as before directed with respect to the 20,000*l*.

All the residue of the testator's property, real and personal, to be sold, and the money applied in the same manner as the residue of the capital, stock, and effects are before directed to be applied.

in such and the same manner as the residue of the capital, stock, debts and effects are hereinbefore directed and applied. And in case all my sons, as well those already born as those hereafter to be born, shall depart this life under the age of twenty-one years, then my will is, and I do hereby direct, that the said capital, stock, goods, debts and effects shall be forthwith sold and disposed of, or collected in such manner as is hereinbefore directed in case all my said sons should refuse or decline to carry on the said trade or business, and that the whole produce thereof shall be forthwith placed out and invested in the purchase of a competent share or competent shares of the parliamentary funds of Great Britain, in the names or name of my said trustees, or the survivors or survivor of them, or the executors or administrators of such survivor, upon such and the same trusts, for the benefit of my said wife and daughter, and their children, and my nephews and nieces as are hereinbefore mentioned expressed and declared of and concerning the stocks, funds or securities, to be purchased with the said sum of 20,000*l*. in the event of all my sons dying without leaving a widow, him or them surviving, or any child or children who shall live to attain the age of 21 years. [Testator then gives several pecuniary legacies.] And as to, for and concerning all the rest, residue and remainder of my estate and effects whatsoever and wheresoever, and of what nature kind or quality soever the same may be, both real and personal, which I shall be seised or possessed of, interested in, or in any manner entitled unto, in possession, reversion, remainder, or expectancy, at the time of my decease, I give, devise, and bequeath the same unto my said trustees, their heirs, executors, administrators and assigns, according to the nature and quality thereof, upon trust to sell and dispose thereof, either by public sale or private contract, and convert the same into money as soon as conveniently may be after my interment, and add the same to the capital of my said trade or business, and employ the same therein in such and the same manner, and to stand and be possessed thereof, subject to the legacies hereby given, upon such and the same trusts, and to and for such and the same intents and purposes as are hereinbefore mentioned expressed and declared of and concerning the residue of my said capital, stock, debts and effects. And for facilitating the sale of my estate and effects in the manner hereinbefore mentioned, I do hereby direct that the receipt and receipts of my said trustees, or of the survivors or survivor of them, or of the

heirs executors or administrators of such survivor, shall from time to time be a good and sufficient discharge and good and sufficient discharges to the purchaser or purchasers of the said premises so to be sold as aforesaid, or any of them, or any part or parts thereof, or to any other person or persons, paying to them any other sum or sums of money under the trusts of this my will, and to his her and their respective heirs executors administrators and assigns, for so much money as shall be therein acknowledged or expressed to have been received. And that such purchaser or purchasers, or other person or persons, his her or their heirs executors administrators or assigns, shall not afterwards be answerable or accountable for any loss, misapplication, or non-application thereof, or any part thereof.(1) And I do hereby appoint my said wife, toge-

Executors appointed.

(1) There is an obvious propriety in this provision. Where such a clause is left out, a way suggested to cure the omission is for the purchasers to see the whole of their purchase-money invested in the 3 per Cent. Bank Annuities, in the name of the executors or trustees, who may thereupon execute deeds, declaring the money so invested to be the same money for which the estates (describing them) were sold, and that the money is so invested on the trusts of the will; and each purchaser should have one part of such deed declaring the trusts of the purchase-money. The Bank books will always, on inspection, afford evidence of the sums having been actually invested in such a quantity of Stock, which will correspond with the precise quantity mentioned in the declaration of trust; and together they will be sufficient proof of a proper application according to the will, so as to absolve the purchaser. It was the opinion of the late Mr. Serjeant Hill, that the purchaser would then have a safe title without a decree: but otherwise he would not be safe, because he has notice of the trust. To obtain a decree, if a decree be necessary, the trustees, or any person as *prochein ami* for the *infant cestui que trusts*, may file a bill to compel a specific performance of the contract by the purchasers, and then the court will direct and confirm the sale. But purchasers of leasehold or chattel estates or interests will be safe without any decree, notwithstanding the omission to make the receipts of the trustees' discharges, if the trustees are also *executors*; for the property in such subjects always vests in the first place, notwithstanding the dispositions of the will, in the executors. A testator cannot prevent them from being assets in the hands of the executors to go in a due course of administration. The power of sale is annexed to their office; and the purchaser is never obliged to enter into the account, or enquire into the necessity of any sale. *Whale v. Booth*, 4 T. R. 625. *Ewer v. Corbitt*, 2 P. Wms. 149. But the transaction must be clear of all fraud or collusion; for if it be tainted with these qualities, the estate will be specifically followed into the hands of the purchaser. So where there is express notice of a debt of testator unsatisfied, and the sale is a contrivance between the purchaser and executor to defeat the debtor, the purchaser makes himself party to the devastation; see *Crane v. Drake*, 2 Vern. 616. Nugent

Substitutionary  
executors nam-  
ed.

Power to the  
trustees to  
renew the lease  
of the testator's  
dwelling-  
house, or to  
purchase other  
premises, with  
full discretion-  
ary powers for  
managing the  
trade.

ther with the said (trustees), to be executrix and executors of this my will; and in case of the death of any two or more of them before the trusts of this will shall be fully performed, then I do nominate and appoint my two eldest sons, for the time being, when they shall respectively have attained the age of 18 years, to be executors of the same in the place of such two or more of them, my said wife and the said trustees, as shall so die before the trusts of my said will shall be fully executed and performed, and with all the same powers and authorities, to all intents and purposes whatsoever, as such executrix or executors, who shall so happen to die, had or might have had under and by virtue of this will, at the time of his or her death. And I do hereby declare that it shall and may be lawful to and for my said wife and the said (trustees), and also to and for my said two eldest sons, when they shall severally become entitled to prove and shall have proved this my will, and the survivors or survivor of them, and the executors or administrators of such survivor from time to time, if need be, to renew the lease of my dwelling-house and premises wherein the said trade or business is now carried on, or to purchase the fee-simple thereof or of any undivided part or share thereof, or to take any other dwelling-house, shop or shops, warehouse or warehouses, or other premises, at such rent or rents as they shall think proper, for the purpose of carrying on the said trade or business, and to hire and employ any servant or servants, clerk or clerks, or any other person or persons whomsoever, to be employed therein, at such salary or wages as they my said trustees and executors for the time being shall think proper, and to repose in such servant or servants, clerk or clerks, or other person or persons, so much and such confidence trust or authority, in the carrying on of the same trade or business, and in the management and disposal of the stock employed or to be employed therein, and in the receipt of any debt or debts to be contracted, in or by the carrying on the trade hereby directed to be carried on, as they my said trustees or the survivors or survivor of them shall in his or their discretion think fit, provided that after any or either of my said sons shall become partners or partner in the said trade or business, such of them as for the time being shall be such partners or partner shall have a voice therein, as well

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*v. Gifford*, 1 Atk. 463. *Hill v. Simpson*, 7 Ves. Jun. 152. And if such sale be without valuable consideration, it falls within the statute, 13 Eliz. c. 5. *Gilb. Eq. R.* 111.

as my trustees and executors for the time being, so as that in case of a difference in opinion, the majority of voices shall decide as hereinafter is mentioned; and also to adjust settle compromise and compound all accounts reckonings transactions matters and things in which I shall be concerned or interested at the time of my decease, or which shall be opened or contracted, or shall arise after my decease, and to pay, on any evidences they shall think proper, any debts claimed from my estate, and also to dismiss any servant or servants, clerk or clerks, or other person or persons, and (with such consent as aforesaid) to hire and employ any other or others in his or their stead, and that from time to time, and as often as my said executors shall think proper. And I do hereby direct, that in all cases where my trustees and executors for the time being shall happen to differ in opinion, the matter of such difference shall be decided by the major part or number of them my said trustees or executors, and be acted upon accordingly. And I do hereby declare my will to be, that they my said trustees and executors and their respective executors and administrators, shall not be answerable or accountable for any loss or damage which shall come or happen to the stock or capital to be employed in the said trade or business, by bad debts, decay of goods, suit or action, or suits or actions, in any court or courts of law or equity, or any other casualties or accidents whatsoever, or by reason of the trust and confidence which they or any of them shall or may place or repose in any servant or servants, clerk or clerks, banker, broker, or other persons, with whom any part of the said trust monies shall or may be deposited or lodged for safe custody or otherwise, or for any other loss or damage which may happen about the execution of this my will, or all or any of the trusts hereby in them reposed; and that they my said trustees and executors, and their respective executors and administrators, shall not be charged or chargeable with or for any sum or sums of money, other than such as shall actually and respectively come to his her or their hands by virtue of this my will. And I do hereby further direct, that it shall and be lawful to and for my said trustees and executors, and each and every of them, by and out of all or any of the monies which shall come to their or any of their hands, by virtue of this my will, to deduct, retain to, and reimburse themselves himself and herself, and to allow his her or their co-trustee or co-trustees all such costs charges and expenses as they respectively shall or may sustain expend or be put unto, in or about the execution of all or any of the trusts hereby in them

If the trustees and executors differ in opinion, the matter in difference to be decided by the majority.

reposed, or in anywise relating thereto. And I do hereby revoke and make void all former and other wills by me at any time heretofore made, and do declare this only to be my last will and testament.

In witness, &c.

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No. 15.

*A Will disposing of real and personal Property by a Testator leaving no Family.*

THIS is the last will and testament of me A. B. of &c. First, I will that all such debts as I shall justly owe at the time of my decease, and my funeral and testamentary charges and expenses, be in the first place paid by my executors hereinafter named. I give and devise unto C. D. of, &c. all and every my messuages lands tenements and hereditaments, whereof I am seised in fee, situate lying and being in \_\_\_\_\_ in the county of \_\_\_\_\_ and now or late in the several tenures or occupations of \_\_\_\_\_ and \_\_\_\_\_ or one of them their or one of their assigns, lessees, or under-tenants; to have and to hold all and every the said messuages lands tenements hereditaments and premises unto and to the use of the said C. D. and his heirs for ever. I give devise and bequeath unto E. F. of \_\_\_\_\_ in the county of \_\_\_\_\_ all my copyhold messuages lands tenements and hereditaments, (which I have duly surrendered to the use of my will) situate lying and being in the said county, and which now are or late were in the several tenures or occupations of \_\_\_\_\_ and \_\_\_\_\_ or one of them, their or one of their assigns, lessees or under-tenants, to have and to hold all and every the said last mentioned messuages lands tenements hereditaments and premises, with their and every of their appurtenances, unto and to the use of the said \_\_\_\_\_, and the heirs of his body lawfully to be begotten; and for default of such heirs, then to my own right heirs for ever. I give devise and bequeath unto \_\_\_\_\_ of \_\_\_\_\_, in the county of \_\_\_\_\_ all those my messuages or tenements, with their and every of their appurtenances,

now in the several tenures or occupations of ——— and ———, or their several lessees undertenants or assigns, situate standing and being in the parish of ———, in the county of ———, and all that my other messuage or tenement with the appurtenances, situate standing and being in the said parish of ———, and near or adjoining to the said two last mentioned messuages or tenements, and now called or commonly known by the name or sign of the ——— and heretofore in the tenure or occupation of ——— his undertenants or assigns, but which is now untenanted; and also all other my messuages or tenements ground and hereditaments in ——— aforesaid with their appurtenances, to have and to hold all and every the said last mentioned messuages or tenements and premises, with their appurtenances (subject nevertheless to and charged with the annuity yearly rent or sum of ———*l.* hereinafter mentioned) unto him the said ——— and his assigns, for and during the term of his natural life: and from and immediately after his decease I give devise and bequeath all and every the same messuages or tenements and premises, with their and every of their appurtenances (subject to and charged and chargeable with the annuity hereinafter-mentioned) unto and to the use of ———, in the county of ———, and the heirs of his body lawfully begotten or to be begotten; and for default of such heirs, then to my own right heirs for ever; and I do hereby give devise and bequeath unto ———, wife of ———, and her assigns, for and during the term of her natural life, one annuity or clear yearly rent or sum of ———*l.* of lawful money of Great Britain, free and clear of and from all deductions or abatements, for or in respect of any taxes charges rates assessments or impositions whatsoever, to be issuing and payable out of all and every the said last mentioned messuages, tenements and premises, and to be paid and payable by equal half-yearly payments, at the two most usual feasts or days of payment in the year, that is to say, the twenty-fifth day of March and the twenty-ninth day of September; the first payment thereof to be on such one of the same feasts as shall first and next happen after my decease; and I do hereby charge and subject all and every the same messuages or tenements and premises to and with the payment of the said annuity of ———*l.* accordingly. And my will is, that in case the said annuity or any part thereof shall be behind or unpaid by the 28 days next after either of the said days whereon the same is hereinbefore directed to be paid as aforesaid, that then and so often as the same shall happen, it shall and may

Testator devises an annuity to be issuing out of the messuages, &c. with power of distress.



be lawful for the said ———, (the annuitant) and her assigns, to enter and distrain upon all and every or any part of the said premises charged with the said annuity as aforesaid, and to dispose of the distress and distresses then and there found, according to law, as in the case of distresses taken by landlords for rents reserved upon leases for years, to the intent that thereby, or otherwise, the said annuity, and every part thereof then in arrear, and all costs and expenses occasioned by the non-payment thereof, may be fully paid. I give devise and bequeath unto ———, of ———, in the county of ———, all that my messuage or tenement (being part freehold and part leasehold) with the appurtenances situate standing and being in ———, in the parish of ———, and now or late in the possession or occupation of ———, his under-tenants or assigns; and also all that my freehold piece or parcel of ground, lying or being in or near an open field, commonly called or known by the name of the ———, in the parish of ———, and now or late in lease to ———, and all those messuages, tenements erections and buildings thereupon, or upon any part thereof now built, and building, with their and every of their respective appurtenances; to have and to hold the said messuages or tenements, and piece or parcel of ground and premises last hereinbefore devised, with their and every of their respective appurtenances, unto the said ———, and her assigns, for and during her life, (she and they keeping the same in good repair); and from and immediately after her decease, I give and devise the same messuages or tenements, pieces or parcels of ground and premises, with their and every of their respective appurtenances, unto the said ———, and the heirs of his body lawfully to be begotten; and for default of such heirs, then to my own right heirs for ever. I give and bequeath unto the said ———, all that my messuage or tenement, with the appurtenances in ———, which I hold by or under a lease from ———, and all my estate right title term and interest of and in the same premises, with the appurtenances; to hold unto the said ———, his executors administrators and assigns, for his and their own use and benefit. I give and bequeath unto ———, of, &c. the sum of ———*l.* of lawful money of Great Britain, to be paid within three calendar months next after my decease. I give and bequeath unto ———, ———*l.* to buy him mourning; such last mentioned legacies to be paid within one calendar month next after my decease. I give and bequeath the sum of ———*l.* of like money, unto the managers of the ——— fund in ———, to be disposed of as they shall think fit,



and the receipt of the treasurer for the same fund for the time being to be a sufficient discharge to my executors for the same; and I give and bequeath the sum of ——.l. of like money unto the managers and trustees of the charity-school in ———, for the use and benefit of the said charity-school; and I will that the receipt of two or three such managers or trustees shall be a sufficient discharge to my executors for the same. I give and bequeath the sum of ——.l. of like money to and for the benefit of the poor members of the society or congregation of ———, in ———, to be distributed in such manner and proportions, and to such objects as my executors hereinafter-named, or the survivor of them, shall think fit. I give and bequeath the sum of ——.l. of like money unto ———, of, &c. and ———, of, &c. their executors and administrators, upon the several trusts, and to and for the several purposes hereinafter mentioned and declared of and concerning the same, (that is to say) upon trust that the said ——— and ———, (the trustees) and the survivor of them, his executors or administrators, shall and do, in their or his own names or name, or in the names of themselves or himself, and of such other person or persons as he or they shall think fit, from time to time put and place out the said sum of ——.l. in or upon some or one of the parliamentary stocks or funds of Great Britain, or on real securities in England at interest, as they my said trustees, or the survivor of them, shall in his or their discretion think fit, and shall and do pay apply and dispose of the clear yearly dividends interest and produce thereof, as the same shall from time to time arise and be received (over and above what shall be sufficient to answer and pay the costs and charges attending the execution of the trusts by me hereby directed concerning the same ——.l.) unto and for the use and benefit of the minister or pastor for the time being of the society or congregation of ———, in ———, for so long time as the said society or congregation shall subsist as a religious society of Protestant dissenters, and continue to meet and assemble together for the worship of God in their present place of religious worship, or elsewhere in ——— aforesaid, or the neighbourhood thereof. Provided nevertheless, and my will and mind is, that in case at any time hereafter the said society or congregation shall be dissolved and broken up, or that the laws and statutes of this realm shall disallow and prohibit the same society or congregation from meeting together for religious worship, as Protestant dissenters are now by law enabled to do, then and in either of the said cases, and when and as

Charitable be-  
quests.

To trustees for  
the benefit of  
a society of  
Protestant dis-  
sentera.

Plate and  
household  
goods to —.

soon as either of such cases shall happen, the said sum of —£., and all the interest and produce from thenceforth to arise and be received, shall fall back into the residuum of my personal estate by me hereinafter given and bequeathed, and shall be go and remain to and for the use and benefit of such person or persons who, for the time being, should or would have been entitled unto such residuum, under this my will. I give and bequeath all my rings whatsoever, and such pieces of my plate as are marked with my own name and arms, and my household goods and furniture, and my wearing apparel, unto the said —, and all my books, and all other my plate (not hereinbefore bequeathed) and all my ready money and securities for money, arrears of rent, debts to me owing, and all my stocks in any of the public companies or funds, and all other my goods chattels and personal estate whatsoever (not hereinbefore by me otherwise bequeathed or disposed of). I also give and bequeath unto —, of, &c. to and for his own use and benefit; and I do hereby constitute and appoint — and —, executors of this my last will and testament; and I give and bequeath unto the said —, the sum of —£. for his care and trouble as one of my executors and trustees. I do hereby authorise and direct my said executors, and the survivor of them, his executors and administrators in the mean time, from and after my decease, until the said — shall attain his age of 21 years, to manage and improve the estate and fortune of him the said —, by me hereby given him for his use and benefit, and to lease all or any part of his freehold, copyhold, or leasehold estates, and to lend and place out upon security or securities at interest, or to lay out in the public companies or funds, or otherwise improve according to his or their discretion or discretions, all or any part of the monies belonging to or arising from the said estates and fortune of the said —, and to pay unto, and account with him the said — for all all such rents, interests, produce and improvements, as shall arise from or be made of and produced by the said estates monies and fortune hereby given devised and bequeathed to him, when he shall attain his age of 21 years. And my will is, and I do hereby declare, that my said executors and trustees, or either of them their or either of their executors or administrators, shall not be charged or chargeable with, or accountable for more of the aforesaid monies and estates, than he or they shall actually receive, or shall come to his or their respective hands, by virtue of this my will, nor with or for any loss which

shall happen of the said monies or estates hereby by me given to the said ———, or of the aforesaid sum of ———l. or of any part thereof, so as such loss happen without their wilful default and neglect; nor the one of them for the other of them, or for the acts, deeds, receipts, defaults or disbursements, the one for the other; and also that it shall and may be lawful for them my said executors, and each of them, their and each of their executors and administrators, in the first place, by and out of the said premises hereby devised to the said ———, respectively to deduct and reimburse him and themselves respectively, all such loss, costs, charges and expenses, as he or they or any of them shall sustain, expend, or be put unto, for or by reason of the performance of this my will, or the trusts hereby in them reposed, or the management and execution thereof respectively, or any other thing, in anywise relating thereunto; and, lastly, I do hereby revoke, &c.

In witness, &c.

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No. 16.

*Will by a Citizen of London, containing Provisions for Daughters and a Son; with Charities, and a provision for keeping a Tomb in repair.*

**THIS** is the last will and testament of me, A. B., of ———. First, I desire that my body may be interred in a private manner, at the discretion of my executor hereinafter named; and whereas my daughter ———, wife of ———, had only ———l. at her marriage; but I have lately paid and given to the said ———, the further sum of ———l. and have also covenanted and agreed to give or leave to them the said ———, and ——— his wife, or the survivor of them, or their children or issue or other representative, either in my lifetime, or in and by my last will and testament, at the time of my decease, the further sum of ———l. which they, the said ———, and ——— his wife, have covenanted and agreed to accept in full for the advancement and preferment of her the said ———, out of all such

Recites a covenant to give or leave the sum of ———l. to his married daughter and her husband, in lieu and full of all her claim under the custom of London.

Bequeaths  
such sum ac-  
cording to the  
covenant.

Gives to such  
persons as shall  
be named in  
any list or note  
to be written  
or signed by  
him, the sums  
therein ex-  
pressed.

Gives annuities  
to his daugh-  
ter, to be issu-  
ing out of  
lands, &c.

part and share as they or either of them can or may or could or might claim or pretend to, of in or out of all or any part of my personal estate, by virtue of the custom of the city of London, or otherwise (except such part thereof as I should or might freely and voluntarily give or leave to them or either of them by my last will and testament, or otherwise:) Now therefore, I do hereby give and bequeath the sum of ——.l. of lawful money of Great Britain, to be paid by my executor hereinafter named, within three calendar months next after my decease, unto the said —, and — his wife, or the survivor of them, or to such other person or persons, as for the time being shall be entitled to receive the same, according to the true intent and meaning of my said covenant and agreement in that behalf entered into by me, and in full satisfaction and discharge of and for the same covenant and agreement. I give and bequeath unto such persons whose names shall, at the time of my decease, be found expressed or contained in any list note or other writing, written or signed by me, the several and respective sum and sums of money which shall be therein set down mentioned or expressed to be by me given to them respectively. I give and bequeath unto my nephew, —, of, &c. in the county of —, and —, brother of the said —, and to their heirs and assigns, for and during the life of my said daughter —, an annuity or yearly rent-charge of —.l. of like money, to be yearly and every year issuing and payable out of all my manors, messuages, &c. in the county of —, upon trust, nevertheless, that the said —, and — shall and do pay apply and dispose of the said annuity or yearly rent-charge of —.l. unto such person and persons, and for such uses and purposes as she the said —, shall from time to time, notwithstanding her coverture, by any note or notes in writing, under her hand, direct or appoint, to the intent that the same may not be at the disposal of, or subject or liable to the control debts forfeitures or engagements of her present or any after-taken husband, but only at her own sole and separate disposal, and for her own sole and separate use and benefit. (The like to two other daughters.) And it is my will and desire that the aforesaid annuities shall be paid to my said daughters, —, by two equal half yearly payments, on the two most usual feasts or days of payment in the year (that is to say) the feast of St. Michael the Archangel, and the Annunciation in every year; the first of the said half-yearly payments to begin and be made on such of the said feasts as shall first happen next after my decease: and my further will

is, that it shall and may be lawful to and for my said trustees, their heirs and assigns, from time to time, in case of non-payment of the said annuities respectively, or any of them, or any part of them, to raise the same by distress upon all or any part of the said premises charged therewith, together with the costs and charges of such distress. And whereas I have already sufficiently provided for my said daughters, — and —, at the time of their respective marriages, with their now husbands, and for which I have all their discharges; and have now likewise sufficiently provided for my said daughter —, in manner aforesaid; yet, nevertheless, as a further provision for my said three daughters, for their separate use (over and above the several annuities hereinbefore given for their benefit, for their respective lives as aforesaid) I do hereby give and bequeath unto the said — and —, their executors and administrators, — l. capital stock in the funds of the united East India company, upon the trusts hereinafter mentioned concerning the same (that is to say) As to one full third part thereof, upon trust, that they my said trustees, their executors or administrators, shall and do pay apply and dispose of the yearly dividends interest and produce thereof, as the same shall from time to time (during the natural life of my said daughter —) arise or be received, into the proper hands of her my said daughter —, or otherwise to permit and suffer her my said daughter —, to receive the same to and for her own sole and separate use and benefit, to the intent that the same may not be at the disposal of, or subject or liable to the control debts or engagements of her present or any after-taken husband, but only at her own and sole and separate disposal; and upon further trust, that they my said trustees, their executors or administrators, shall and do, from and after the decease of my said daughter —, transfer and dispose of the said third part of the said — l. stock, unto all and every or such one or more of the children or grand-children of her the said —, which shall be then living, in such parts shares and proportions, manner and form, as she, notwithstanding her coverture, or whether she shall be sole or married, by her last will and testament in writing, or any writing purporting to be her last will and testament, or any codicil thereto, to be by her signed sealed and published in the presence of three or more credible witnesses, shall direct limit give or appoint the same; and in default thereof, then unto and amongst all and every the children of her the said —, which shall be living at the time of her decease, equally to be divided between them (if

Makes a farther provision for his three daughters, out of East India stock.

Receipts of the daughters to be discharges.

Daughters to release all claims by virtue of the custom of London.

If the E. I. stock should be paid off, the money to be laid out in other securities upon the like trusts.

more than one) share and share alike, and the child or children of such of them as shall be then dead, in like manner to be divided among them, such child or children to have his her or their father's or mother's share only. Provided nevertheless, that in case my said daughter ——— shall have no such children or grand-children living, at the time of her decease, then my said trustees, their executors or administrators, shall assign and transfer the said third part of the said ——— l. stock, unto ———, his executors and administrators, to and for his and their own use and benefit; and as to one other third part of the said ——— l. capital stock, upon trust, that they my said trustees, their executors or administrators, shall and do pay apply and dispose of the yearly dividends interest and produce thereof, as the same shall, from time to time, (during the life of my said daughter ———,) (another daughter) arise or be received, unto the proper hands of her the said ———, or otherwise, &c. (as before.) And as to the remaining third part of the said ——— l. stock, upon trust, &c. (for another daughter's benefit, as before.) And my will is, that the respective receipts of my said several daughters alone, under their respective hands, as well for their said several and respective annuities or rent-charges, as for their several parts and shares of the yearly dividends interest and produce of the said East India stock, shall from time to time, notwithstanding their respective covertures, be good and sufficient discharges to the person or persons paying the same annuities and dividends, interest or produce, for so much thereof for which such receipts shall respectively be given. Provided always, and my will is, that my said three daughters and their respective husbands shall, (in case my executor requires it) give him, within two calendar months next after my decease, a further and sufficient release and discharge from all their respective further claims and demands whatsoever, out of my said estate, by virtue of the said custom of the said city of London, or otherwise; and in case of their neglect or refusal so to do, then all and every of the gifts devises annuities legacies and appointments by this my will made or given, to or for the benefit of them, or such of them so neglecting or refusing, shall cease and be void, for the benefit of my executor, his executors and administrators. And in case the said East India stock, or any part thereof, shall be redeemed or paid off, then my will is, that my said trustees, their executors or administrators, shall and do lay out the monies to be received for and in lieu of the stock so redeemed or paid off, in such stocks funds or other public or private se-



curities, as my said three daughters shall respectively agree to; and that the monies so received and laid out, shall be subject to the same trusts, and the same or the like intents and purposes as hereinbefore declared, of and concerning the respective shares of my said daughters, of and in the said ——. East India stock. I do hereby direct and appoint, that my executors shall with all convenient speed after my decease, out of my personal estate, lay out so much as will be sufficient to purchase as much stock in any one of the public funds, or parliamentary stocks of Great Britain, as will produce the annual sum of ——. and do and shall be possessed of and interested in such last-mentioned stocks funds and securities, in trust for the churchwardens and overseers for the time being, of the said town of —, for the placing out one or more poor boy or poor boys, born or to be born in the said town and parish of ——— aforesaid, as far as the said yearly sum of ——. will extend, to be an apprentice or apprentices to some handicraft trade, or a mariner or mariners, and that the children of such persons of the said town and parish, who have been very industrious in their callings or way of living, for the support and maintenance of their families, and have not been in the poor's book, shall have the preference to all others. Provided nevertheless, that in case the monument erected in the parish church of ——— aforesaid, by my brothers and myself, to perpetuate (as much as in us lay) the memory of our dear parents, shall at any time want repairing, or the gilt letters upon the same shall be defaced, and become not legible, then and so often as the same shall happen, it is my will, that so much money be from time to time taken out of the said yearly sum of ——. as shall be sufficient to repair the said monument, and make the said gilt letters thereon legible, and from time to time to maintain and preserve the same in such condition; and in such years wherein such repairs shall be made, only the overplus of the said yearly sum (above what shall be sufficient for such repairs) shall be employed towards placing out such poor boy, or poor boys, in manner aforesaid. And whereas my brother ———, late of ———, merchant, deceased, did (among other things) by his will give to me the sum of ——. to be by me given away distributed divided and disposed of amongst such of my children, or other relations, in such sort and manner, and in such shares, and at such times, as I should think fit; now my will is, and I do hereby direct that the said sum of ——. shall be distributed divided and disposed of by my executor hereinafter named, within six months after my decease,

Provision for keeping the tomb of testator's parents in repair.

Distribution of money left by his brother, according to a power given to the testator for that purpose, among his (the testator's) children.



to and amongst such of my children, and in such proportions and manner as hereinafter mentioned and expressed, (that is to say) to my said daughter ———, the sum of ———l. (part thereof); to my said daughter ———, the like sum of ———l. (other part thereof); to my said daughter ———, the like sum of ———l. (other part thereof); and all the residue of the same ———l. to my daughter ———. And I give devise and bequeath all and every my manors, &c., in the county of ———, or elsewhere within the realm of England, as well freehold as copyhold and leasehold for lives, with their and every of their appurtenances, unto and to the use and behoof of my son ———, his heirs and assigns for ever, subject nevertheless as to my said estate in the said county of ———, to the aforesaid annuities, or yearly rent charges by me hereinbefore given thereout, or charged thereon, in trust, and for the benefit of my daughters, for their respective lives as aforesaid, or such of them as shall be subsisting. [Residuary devises and bequests, appointment of executors, and revocation of all former wills.]

In witness, &c.

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No. 17.

*Will of a married Woman, by virtue of a Power.*

Recites part of  
a settlement  
creating the  
power.

**THIS** is the last will and testament of me A. B., wife of C. D., of, &c. Esq. Whereas, in and by a certain indenture of three parts, bearing date on or about the ——— day of ———, and made or mentioned to be made between the said C. D., of the first part, me the said A. B., by my then name of ———, of the second part, and E. F., of, &c. merchant, and G. H., of, &c. of the third part, and made previous to, and in contemplation of my marriage with the said C. D., my now husband, divers leasehold messuages, &c. Bank stock, and East India bonds of me the said A. B., were thereby assigned and transferred unto the said E. F. and G. H., their executors administrators and assigns, in manner therein expressed, in trust nevertheless for the sole and separate use and benefit of

me, the said A. B., and with full and absolute power for me, from time to time, notwithstanding my coverture, and whether I should be sole or married, by any writing or writings, under my hand and seal, attested by two or more credible witnesses, or by my last will and testament in writing, or any writing or writings purporting to be my last will and testament, to be by me signed sealed published and declared in the presence of the like number of witnesses, to dispose of the said leasehold messuages, &c. Bank stock, and East India bonds, or any part thereof, to such person or persons, and in such proportions and manner as I should think fit, as in and by the said indenture, may more fully appear. Now in testimony of the sincere love and affection which I have, and justly bear, towards the said C. D., my dear husband, and by virtue of the power and powers, authority and authorities, to me reserved, and given in and by the said in part recited indenture, and of all other power and powers, authority and authorities, any wise enabling me thereunto, I, the said A. B. do by this my last will and testament, duly signed sealed and published by me in the presence of the persons whose names are hereunder written as witnesses thereto, give devise bequeath direct limit and appoint all and every the said leasehold messuages or tenements, Bank stock, East India bonds, and all other my messuages, &c. stocks bonds goods chattels monies and estate whatsoever and wheresoever, and of what nature or kind soever, whereunto I am entitled at law or in equity, or whereof I have any power to dispose, and all my estate and interest therein, unto my said husband, the said C. D., his heirs executors administrators and assigns respectively, to and for his and their own use and benefit absolutely; and I do hereby direct my said trustees, in the said recited indenture mentioned, to convey assign and transfer over the same and every part thereof to him and them accordingly; yet nevertheless my mind and will is, and I do hereby desire and request my said husband to give (out of what I have heretofore bequeathed to him) unto his daughter ———; by his former wife, (in case he shall think fit, and in his judgment she shall prove deserving of the same,) the sum of ———/ of lawful money of Great Britain, to be paid to her at such time or times, and in such manner or proportions, and under such restrictions in all respects, as he shall direct, and think may be most for her benefit. And I do hereby constitute and appoint my said husband, C. D., sole executor of this my last will and testament; and I earnestly desire of him that I may be buried where he himself intends to

Executes the power in favour of her husband.

be buried, and that he will give proper directions in his will for that purpose in case he should survive me; and, lastly, I do hereby revoke, &c. In witness, &c.

Signed, &c.

No. 18.

*Short Will of an unmarried Woman.*

THIS is the last will and testament of me, A. B., of &c. First, I desire to be decently and privately buried in the church or church-yard belonging to the parish in which I shall happen to die, without any funeral pomp, and with as little expense as may consist with decency and propriety; and I give and bequeath unto the poor of that parish in which I shall happen to die, the sum of—£. to be distributed in such proportions and manner, as my executrix hereinafter named, shall think fit; also, I give and bequeath unto such of the children of my late sister ———, as shall be living at the time of my decease, the sum of—£., to be equally divided between them, share and share alike, and to be paid to them at their respective ages of twenty-one years, or days of marriage, which shall first happen; and in case any of them shall happen to die before the age of twenty-one years, or marriage, then I give and bequeath the share or shares of her or them so dying, to the survivors of them, to be equally divided between them, payable as aforesaid; but if only one of my said sister's children shall live to attain the age of twenty-one years, or be married, then to such survivor. Also, I give to my servant ———, the sum of—£., of like lawful money, and all my wearing apparel, in case he shall be living with me at the time of my decease, but not otherwise. And I give and bequeath all my third part share and interest of and in the family pictures which were my late mother's, unto my sisters ——— and ———, for their lives, and the life of the survivor of them; and after the death of the survivor of them, I give and bequeath my said part and share of the said pictures unto the eldest son of my late sister ———, which shall be then

living, and I desire that I will never sell or dispose of any of them, but that they may always remain and continue in the family; also, all the rest and residue of my goods chattels and estate whatsoever and wheresoever, or of what nature kind or quality soever, (after payment of my just debts legacies and funeral expenses,) I give and bequeath the same and every part thereof, unto my said sister ———, whom I do hereby make sole executrix of this my last will and testament; and I do hereby revoke, &c.

In witness, &c.

No. 19.

*Short Will of personal Estate for an only Daughter.*

THIS is the last will and testament of me, A. S., of ———, widow. First, I will and direct that all my just debts and funeral expenses be fully paid and satisfied; and subject thereto, and to the payment of the three several pecuniary legacies of ———/ each, hereinafter bequeathed, I give devise and bequeath all my goods chattels plate jewels monies securities for money South Sea annuity stock debts and other personal estate, of what nature or kind soever, and wheresoever, unto A. B. and C. D., of ———, and to their executors and administrators, upon the trusts, and for the purposes hereinafter mentioned, (that is to say) in trust that they the said A. B. and C. D., and the survivor of them, and the executors or administrators of such survivor, do and shall, by and out of the interest dividends and produce of my said estate and effects, pay and apply the sum of 50/ a-year, to and for the maintenance and education of my daughter ———, in such manner as they shall think fit, until she shall attain the age of twenty-one years, or shall be married; and upon her attaining that age, or day of marriage, which shall first happen, to pay assign and set over the said trust estate and effects, and all interest and dividends due thereon, and produce thereof, and all securities whereon the same shall then be placed out or invested, to her, my said daughter, for her own sole use and benefit absolutely for ever: but in case my said daughter shall happen to die before she

attains the age of twenty-one years, and unmarried, then I give 200l., part of the said trust estate, to ten poor widows of clergymen of the church of England, who are of good life and conversation, and proper objects of charity, to be equally divided amongst them, share and share alike, at the discretion of my said trustees, or the survivor of them; and all the rest and residue of my said estate and effects I will and direct shall go to and be enjoyed by my nearest of kin, in the same manner and proportions as the same would go, and be distributable according to the statute for distribution of intestates' estates. And I do hereby constitute and appoint the said A. B. and C. D. executors of this my last will and testament, hereby revoking, &c.



### No. 20.

*A comprehensive Devise and Bequest of various descriptions of Property to Trustees, for the Sale and Accumulation of the Produce.*

I GIVE devise and bequeath all my stocks funds money mortgages, and all lands tenements and hereditaments whatsoever, to which I am beneficially entitled, or which have been conveyed to or vested in me by way of mortgage security or trust, and all my estate right title and interest of in and to such mortgaged premises, and all securities for money, and all my goods chattels and personal estate whatsoever, and wheresoever, and of what nature or kind soever, not otherwise by me disposed of, after and subject to the payment of my just debts funeral expenses and the several legacies bequests and dispositions by me given bequeathed or made, or hereafter to be given bequeathed or made, and all my estate and interest therein, unto the said — and — their heirs executors and administrators respectively, according to the several natures and qualities of the same, upon the trusts following, (that is to say) upon trust, that they my said trustees, and the survivor of them, and the heirs executors administrators and assigns of such survivor, do and shall stand and be seised and possessed of the estates vested in me as a trustee, upon the trusts thereof re-

spectively, and to re-convey assign and dispose of the mortgaged lands tenements and hereditaments, when the principal and interest thereby secured respectively shall be paid off, and receive the principal and interest, which shall be due therefrom respectively, and give receipts for the same when paid; and also do and shall sell and dispose of all the real estates, to which I am beneficially entitled, and of which I have power to dispose, and also all the leasehold estates that I may hold at the time of my decease, from time to time, as they shall find purchasers for the same, or do and shall sell the same at public auction, or otherwise, at their discretion, subject nevertheless and without prejudice, to the privilege hereinbefore given to my said wife, of occupying, during her life, such of my leasehold houses as may be in my own occupation at the time of my decease; and also shall and do make sale of such other parts of the residue of my personal estate as shall be saleable. And I hereby declare, that the receipt or receipts of the said ——— and ———, or the survivor of them, or the executors or administrators of such survivor, shall be effectual discharges for so much money as shall be therein acknowledged or expressed to have been received. And I do hereby declare my will to be, and direct that the said ——— and ———, and the survivor of them, and the executors or administrators of such survivor, shall and do from time to time place out and invest the monies which shall arise by sale of my real estate, and such parts of my personal estate as are saleable, including the leasehold estates directed to be sold as aforesaid, and also such monies as shall be collected received or got in from the other part of my personal estate as aforesaid, and the intermediate dividends interest and proceeds thereof, in the stock of the Bank of England, or on real or government securities, or in some of the public funds, in the names of the said ——— and ———, or the name or names of the survivor of them, or the executors or administrators of such survivor; which securities and funds, and all other securities and funds, in or upon which all or any of the said trust-monies, or any other trust-monies which shall come to their or any of their hands, under or by virtue of this my will, or the trusts or powers herein expressed, and not hereinbefore directed to be otherwise disposed of, shall be invested, it shall and may be lawful to and for my last-named trustees, or the survivor of them, or the executors or administrators of such survivor, to alter and transpose at discretion. And I do hereby declare my will to be, that the dividends interest and proceeds of all such securities and funds shall from

time to time be accumulated and laid out on such securities or funds as aforesaid, in the names of the said ——— and ———, or the name or names of the survivor of them, or of the executors or administrators of such survivor; and that a like disposition shall be made of the dividends interest and proceeds of the securities and funds, in or upon which such accumulated dividends interest and proceeds shall be so invested, and so from time to time, with respect to the future accumulated dividends interest and proceeds of such several and respective securities and funds, and of such other securities and funds, in or upon which any accumulated dividends interest and proceeds shall be invested, but so as no such accumulation be carried on or made beyond the term of 21 years, to be computed from the time of my decease. And my will is, and I do hereby further declare and direct, that the said ——— and ———, and the survivor of them, and the executors and administrators of such survivor, shall and do, from time to time, as convenient purchases shall be found, make sales of a competent part of the securities and funds, in or upon which the several and respective trust monies last-mentioned shall be invested, or call in a competent part of such trust monies, and lay out and invest the same from time to time in the purchase of freehold manors messuages farms lands tenements or hereditaments, of a clear and indefeasible estate of inheritance in fee-simple, in possession, situate arising or being in some convenient place or places in England, free from incumbrances, except chief or quit rents, or other inconsiderable outgoings, together with such copyhold hereditaments, as may be intermixed, or be necessary or convenient to be held and enjoyed therewith, if any such there shall be, and the person or persons who for the time being shall, by virtue of, or under the limitations in this my will contained, be entitled in possession to my said mansion house, called ——— place, shall approve thereof, such approbation to be testified in writing; and shall and do convey settle and assure, or cause to be conveyed settled and assured, all and singular the hereditaments so to be purchased with their respective appurtenances, to and for such uses intents and purposes, upon such trusts, and with under and subject to such powers provisos limitations declarations and agreements, as are herein declared or expressed of or concerning the hereditaments hereinbefore by me devised, and which shall from time to time be subsisting undetermined, and capable of taking effect. And I do hereby further declare my will to be, that the



dividends interest and annual proceeds of the several funds and securities in or upon which the said several and respective trust-monies, and the trust-monies accruing thereupon, shall at the expiration of the said term of 21 years be invested, shall from the expiration of the said term of 21 years go and be paid and payable to such person and persons, and in such course order and manner, as the rents and profits of the several hereditaments hereinbefore by me devised, shall, by virtue of the limitations aforesaid, go and be made payable and applicable.

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No. 21.

*Power given in a Will to a person to whom a life estate is limited, to charge the estate with portions for younger children, varying in amount with the number of children to be provided for.*

**PROVIDED** always, and I do will and direct, that it shall and may be lawful to and for my said daughter Margaret, by any deed or deeds, instrument or instruments in writing, with or without power of revocation, to be by her sealed and delivered in the presence of, and attested by, two or more credible witnesses, or by her last will and testament in writing, or any codicil or codicils thereunto, to be signed and published by her in the presence of, and attested by, three or more credible witnesses, (but subject and without prejudice to the said annual sums or yearly rent charges hereinbefore limited by this my will, and the powers and remedies for recovering the same,) to subject and charge all or any part of the said hereditaments and premises hereinbefore limited in use to her for life, to and with the payment of any sum or sums of money for the portion or portions of all and every the child or children of the body of my said daughter, lawfully to be begotten, (other than and except, and not being an eldest or only son (1) entitled for the

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(1) Every child, except the heir, is considered in equity as coming within the description of younger children; thus the eldest daughter, where there is a son, or where the estate by a settlement goes all to a remainder-

Who in equity are younger children.

time being to the hereditaments and premises, or any part thereof, either in possession or in remainder, expectant on the decease of my said daughter, under the limitation contained in this my will,) not exceeding the amount hereinafter mentioned, that is to say, if there shall be no more than one such child, (other than and except as aforesaid,) not exceeding the sum of 5000*l.* for his or her portion; if there shall be two such children, and no more, (other than and except as aforesaid,) not exceeding 10,000*l.* for the portions of such two children; if there shall be three such children, (other than and except as aforesaid,) not exceeding 15,000*l.* for the portions of such three children; and if there shall be four or more such children (other than and except as aforesaid,) not exceeding 20,000*l.* for the portions of such four or more of them; with interest for such portion or portions; the same respectively to be paid to such child or children at such age day or time, or ages days or times, and if more than one, in such parts shares and proportions, and subject to such conditions restrictions and limitations over, such limitations over to be for the benefit of some or one of such children, (other than and except as aforesaid,) as my said daughter Margaret shall deem prudent and expedient, and by any deed or deeds, instrument or instruments in writing, so to be sealed delivered and attested as aforesaid, or by such last will and testament, codicil or codicils thereunto, so to be signed published and attested as aforesaid, shall direct limit or appoint; but so, nevertheless, that if such children, so entitled to have or be provided with portions as aforesaid, shall be reduced to three, such three children shall not be entitled to have more than 15,000*l.* raised for their respective portions; and if such children shall be reduced to two, such two children shall not be entitled to have more than 10,000*l.* raised for their respective portions; and if such children shall

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man, is a younger child in equity, *Beale v. Beale*, 1 P. Wms. 244. And if a younger son becomes eldest, he is excluded, *Lord Teynham v. Webb*, 2 Ves. 198. In *Lady Lincoln's* case, one, who was a younger son at the death of the testator, and the tenant for life, becoming eldest before 21, till which the portions were subject to survivorship, on the whole will was held not entitled, 10 Ves. Jun. 166.

Even an eldest son, not provided for, may be considered as a younger, of which see a curious instance in *Duke v. Doidge*, 2 Ves. 203, in the note. And where the descent is according to the custom of Borough English, without doubt, upon the same principle, the eldest son would be a younger to this purpose in equity.

be reduced to one, such one child shall not be entitled to have more than 5000*l.* raised for his or her portion.

(Power to create a term of years for raising the said portions.)

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**No. 22.**

*Devise of an Advowson to Trustees to present a certain Person to the next Avoidance.*

I GIVE and devise my advowson and right of patronage of and to the living of H., in the county of —, to F. P., of, &c. and W. L., of, &c. and their heirs, to the use of the said F. P. and W. L., their heirs and assigns, in trust that they or the survivor of them, or the heirs or assigns of such survivor, shall and do present I. T., of, &c. to the next turn or avoidance thereof, and subject thereto, upon trust to convey the same to and for such uses intents and purposes, upon such trusts, and under and subject to such powers provisos limitations and declarations, as in and by this will are limited declared and expressed of and concerning my other hereditaments and real estate in the county of, &c. or such of them as shall be subsisting and capable of taking effect.

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**No. 23.**

*Words of a Will whereby a Testator charges his Debts, Legacies, &c. upon all his Estate.*

THIS is the last will and testament of me, M. H., of, &c. made this — day of —, in the year —. I charge all my real and personal estate, of what nature or kind so-

ever, with the payment of all my debts funeral expenses and legacies, as well such as I shall hereby give, as such other legacies and annuities as I may hereafter give by any codicil or codicils to this my will.(1)

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No. 24.

*Clause to prevent an Annuitant under the Will from parting with his Annuity.*

AND my will further is, and I do hereby expressly declare and direct, that in case my said nephew, A. B., shall alien sell assign incumber or transfer, or in any manner dispose of or anticipate the said annuity or yearly sum of 200*l.* or any part thereof, then and in such case and from and immediately after such alienation sale assignment or transfer, the said bequest so made thereof as aforesaid, and the use and estate so given to him therein, shall cease and be void, to all intents and purposes as if the same had not been mentioned in this my will, or as if the said C. K. were naturally dead.

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(1) By such words in a will duly executed a testator enables himself to lay any number of additional legacies on the land by a subsequent testamentary disposition unexecuted.

What words are necessary to charge a specific devisee with legacies.

It is to be observed, that words importing clear intention to charge the realty are necessary to make the land in the hands of a specific devisee thereof subject to legacies; therefore, if a clause, either at the beginning or end of a will, run thus, "First, I will and direct, that all my debts legacies and funeral expenses shall be fully paid," these words will not charge legacies on real estate specifically devised, though perhaps by such words the residuary real estate might be charged with the legacies. And perhaps also this would be considered as sufficient to charge even *specific* devisees in their order, (for the general devisee and the heir come first into contribution) with the *debts*. See *Knightley v. Knightley*, 2 Ves. Jun. 328. But the Lord Chancellor doubted of the distinction in this respect, in *Williams v. Chitty*, 3 Ves. Jun. 545. The Master of the Rolls, however, maintained the distinction in *Shallcross v. Finden*, 3 Ves. Jun. 736. And see 3 P.Wms. 91. *Harris v. Ingledew*, ib. 358.

In this last case the words at the beginning were, "After payment of all my just debts, funeral expenses;" and it was clearly held that the *debts* were charged by these words.

## No. 25.

*Devise of Copyholds and Leaseholds, for lives and years, to Trustees, to the same uses as the Freehold.*

AND I give and bequeath all my customary or copyhold messuages lands hereditaments, and also all my messuages farms lands tenements and hereditaments whatsoever, which I hold by virtue of or under any grant lease or demise from the Crown, or any college in either of the Universities, or from any bishop dean and chapter, or other person, body politic or corporate, ecclesiastical or civil, for term of life or lives, or years determinable on deaths, or usually renewable at certain times and periods respectively, and also all my leasehold messuages lands and tenements, which I hold for any term or number of years (in case any such there be) unto the said — and —, their heirs executors administrators and assigns respectively, according to the nature and quality of the same respectively, for and during all my estate and interest therein, upon trust that my said trustees, and the survivor of them his heirs executors and administrators, shall and do settle and assure the same, so and in such manner as that the clear residue of the rents issues and profits of the same copyhold and leasehold premises respectively, may be received taken and enjoyed by and for the use and benefit of such person or persons as for the time being shall, by virtue of this my will, and the settlement to be made according to the directions hereinbefore contained, be entitled to any estate of freehold and inheritance, of and in my said manors hereditaments and premises in the said counties of — and —, and until some persons entitled to an estate of inheritance shall, by good assurances in the law, become seised of the said manor hereditaments and premises in fee simple, in possession; and immediately upon or after that event, the trustees in the said settlement of the said copyhold and leasehold premises shall be thereby directed and required to surrender assign and assure the said copyhold and leasehold lands tenements and premises, with their and every of their appurtenances, and all estates terms and interests of my said trustees of and in the same, unto such person or persons so seised of or entitled to

the inheritance of the said manors messuages lands and hereditaments aforesaid, by such deeds writings instruments surrenders and assurances, as by such person respectively, or by his counsel learned in the law, shall be reasonably advised or required : and also upon trust that my said trustees, and the survivor of them, his heirs executors or administrators, in the mean time, and until such settlement shall be made, do and shall by and out of the rents and profits of the said leasehold premises, pay the rents and perform the covenants reserved by the original and subsisting leases, and also by and out of my personal estate renew the leases of the same premises, and take new leases thereof respectively, in their own names, when and as it shall be usual and requisite, and also from time to time make such proper surrenders of the leases subsisting, as shall be requisite, and necessary or incident to such renewals ; and also do and shall by and out of my said personal estate, or the rents and profits aforesaid, pay and discharge the fines and fees of admissions to and surrenders of my said copyhold lands.



## No. 26.

*Devise of the residue of Testator's personal estate, in trust, to sell, call in, dispose of, and convert into money, such part as shall not consist of stock, or real securities, and invest it in securities, and thereout make a marriage provision for a collateral relation.*

AND as to all the rest residue and remainder of my personal estate, money in the public funds, and money out at interest, and securities for money, arrears of rent, goods, chattels and effects, of what nature or kind soever, not herein specifically bequeathed, I hereby give and bequeath the same, and every part thereof, unto the said \_\_\_\_\_ and \_\_\_\_\_, their executors administrators and assigns, upon trust, that they, the said \_\_\_\_\_ and \_\_\_\_\_, and the survivor of them, and the executors or administrators of such survivor, shall and do as soon as conveniently may be after my decease, receive collect call in dispose of and absolutely convert into ready money, so much and such part of the said residue of my personal estate

to them bequeathed, as shall not at the time of my decease consist of stock in the public funds, or of government or real securities; and shall and do lay out and invest all such sum and sums of money as shall arise by converting into ready money all such part of the said residue of my personal estate as aforesaid, either in the public funds, or on real or government securities, at interest, and shall and do stand and be possessed thereof, and also of all such part of the residue of my personal estate as shall at the time of my decease consist of stock in the public funds, or of government or real securities respectively, and of the interest dividends and annual produce thereof, upon the trusts and subject to the directions and declarations hereinafter contained (that is to say,) upon trust, that my said trustees, or the survivor of them, and the executors administrators or assigns of such survivor, shall and do by and out of the same residue raise —£. of lawful money of Great Britain, and pay the same to the said —, or to such person or persons as she shall by any deed or writing, executed by her in the presence of two or more credible witnesses, direct or appoint, immediately upon, or in certain prospect of her marriage, as and for her pecuniary fortune or marriage portion, and for which her receipt alone, notwithstanding her coverture, or that of her legal assignee, shall be an effectual discharge, so as an adequate and proper jointure and provision for her and her issue be settled and secured in consideration thereof. Provided that in case my said niece shall die without having been married, then the said sum of —£. shall not be raised and paid at all, but shall sink into and become a part of, the residue of my personal estate, for the benefit of the person or persons who shall become entitled thereto under this my will.

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No. 27.

*Bequest of Jewels, &c.*

I ALSO give to my said wife the use of all my jewels and pearls, usually worn by herself, during her widowhood; and upon the marriage or decease of my said wife, which shall first happen, I give the same jewels and pearls to the said



Power for the tenants for life, as they come into possession, to appoint the use of the jewels to their widows respectively for their lives.

Power for the trustees to have them reset.

E. A. and G. C., their executors administrators and assigns, upon trust that they permit and suffer them to be used and enjoyed by the person or persons, who, from time to time, shall, by virtue of the limitations to be contained in the settlement so to be made as aforesaid, be for the time being entitled to the immediate freehold of the estates to be therein comprised, but so as that the same shall not vest in any child or children of any person or persons to be therein made a tenant or tenants for life, who being a son or sons shall not attain the age of 21 years, or being a daughter or daughters, shall not attain that age, or marry. Provided always, and I do hereby declare my will and mind to be, that it shall and may be lawful to and for my said son W., and after his decease, my son T., and my grandson L., when and as by virtue of any of the limitations to be contained in the settlement or settlements so to be made as aforesaid, they shall respectively be entitled to the immediate freehold of the hereditaments, in such settlement or settlements to be comprised, by any deed or deeds instrument or instruments, to be by them respectively sealed and delivered, in the presence of and attested by two or more credible witnesses, or by their respective last wills and testaments, or any codicil or codicils thereto, to be by them respectively signed and published in the presence of and attested by the like number of witnesses, to direct or appoint, that any woman or women, whom they may respectively marry, shall have the use of all or any part of the said jewels or pearls, during her or their widowhood, or respective widowhoods; and my said trustees shall permit and suffer the same to be used and enjoyed by her or them accordingly. Provided always, and I do hereby direct the said E. A., and G. C., and the survivor of them, and the executors administrators and assigns of such survivor, at the request of the person or persons, who, for the time being, shall be entitled to the use of the aforesaid jewels and pearls, by virtue of this my will, to have them or any of them reset, so that their value shall not thereby be lessened, the expense of such resetting to be paid out of the fund hereinbefore directed to be established, or to exchange the same, or any of them, for others of equal or greater value (except with respect to my family pearl necklace, the ruby ring set with diamonds, the emerald ring set with diamonds, and the sapphire ring, with the figure of ———— engraved upon it, which I desire may be preserved in their present state). Provided, and I do hereby declare my will to be, that it shall and may be lawful to and for the said L. C. H. to have

the use of my pearl bracelets, with diamond clasps (1), during her life, unless she shall marry again ; but that immediately upon her decease, or second marriage, which shall first happen, the same shall vest in the said E. A. and G. C., or the survivor of them, his executors or administrators, upon such trusts as hereinbefore declared or expressed of or concerning the jewels aforesaid.

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No. 28.

*Appointment under a Power for the Benefit of Testator's younger Children.*

AND whereas my surviving daughters have respectively attained the age of 21 years, but my younger son is still an infant, of the age of 15 years; now I, the said A. B., by force and virtue, and in exercise of the said power and authority, do by this my last will and testament in writing, signed and sealed by me, in the presence of, and attested by, the three credible persons whose names are intended to be hereunder written as witnesses to my signing sealing and publishing this my last will, direct and appoint the sum of ————£., residue of the said sum of ————£., or such other sum of money as shall be to be raised under the trusts of the said term of 99 years, to be raised immediately after my decease, out of my said family estates, under the trusts of the said term, and to be divided amongst my said three children, Mary Caroline, Elinor, and Edward, and any other child or children whom I may hereafter have by the said ————, in the shares and manner hereinafter mentioned, (that is to say)

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(i) If a testator bequeaths a certain thing, which he specifies as being his own, the legacy will not have its effect, unless that thing be found extant among the testator's property; as, if he bequeaths it by the words, ' my watch, my diamond ring,' &c.; but if he says, ' I bequeath a watch,' or ' a diamond ring,' the legacy will have its effect, if the value and species are described so as to render it sufficiently certain, and this is the rule of the civil law, Domat. 2 V. 159. s. 21.

to be paid and divided among all my said younger children, in equal shares and proportions; the respective shares of my said daughters ——— and ———, to become vested and payable upon my decease, and to carry interest from that time at the rate of ——— per cent. per annum; and the share of my said son E. to be paid on his attaining the age of 21 years; and the share and shares of such child, or such of the children which I may hereafter have by the said ———, as shall be a daughter or daughters, to be paid at her or their age or respective ages of 21 years, or day or respective days of marriage, which shall first happen, and as shall be a son or sons, at the age of 21 years. And I do hereby direct and appoint, that the trustees or trustee for the time being of the said term of years shall levy and raise, and pay to or for my said son E., and such child or children as I may hereafter have by the said ———, from the time of my decease till they respectively shall become entitled to receive their shares of the said sum of ———l., or such other sum of money as aforesaid, for or towards his or her maintenance and education, any yearly sum not exceeding the yearly sum of 200l. a-piece. And my will is, and I do hereby declare direct and appoint, that in case my said son E., or any such child or children as I may hereafter have by the said ———, shall die before his or her share, or their respective shares of the said principal money shall become payable, that then the share and shares of him her or them, or any of them so dying, shall go to and be divided between my surviving children, if more than one, in equal shares and proportions; and if only one, then the whole shall go to such one surviving child, and shall be considered as part of the original portion or portions of such child or children.

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No. 29.

*Clause in a Will, directing a Power of leasing and of selling and disposing, to be inserted in the Settlement directed to be made of the Testator's real Estates.*

AND I do hereby declare my will to be, that in such settlement there shall be contained a power to enable the said E. A.

and G. C., and the survivor of them, and the executors and administrators of such survivor, from time to time, during the continuance of the said term of 2000 years hereby limited and created, and after the determination thereof, for the person or persons, who for the time being shall, by virtue of the limitations in such settlement to be contained, be entitled to the said manors and hereditaments hereinbefore devised and comprised in the same term, for an estate of freehold, to grant demise limit or appoint the said hereditaments, or any of them, or any part thereof, for any term or number of years, not exceeding 21 years, at the most improved rent, without taking any fine, and under the usual restrictions: and also a power to enable the said E. A. and G. C., and the survivor of them, and the executors and administrators of such survivor, from time to time, and at any time or times hereafter, at the request and by the direction of the person or persons who, for the time being, shall be entitled to the hereditaments to be comprised in the settlement hereby directed to be made as aforesaid, for an estate of freehold, either in possession or in remainder, immediately expectant on the said term of 2000 years, signified by some writing, under the hand and seal, or hands and seals, of such person or persons, and attested by two or more credible witnesses, to make sale of, or to convey in exchange for, or in lieu of other hereditaments, all or any of the hereditaments to be comprised in the settlement so to be made as aforesaid, and the fee simple and inheritance thereof, as well as for the said term of 2000 years, due regard being had to the proviso next hereinafter contained or expressed, with the usual clauses, making the receipts of the said E. A. and G. C., or the survivor of them, or the executors or administrators of such survivor, effectual discharges to the purchaser or purchasers of the hereditaments which shall be so sold, and the usual directions to lay out the money to arise by such sale or sales, in the purchase of other freehold lands of inheritance, or of copyhold lands convenient to be held with the lands hereby devised, or any of them, or so to be purchased or taken in exchange, in pursuance of this my will, and to settle the lands so to be purchased, or so to be received in exchange as aforesaid, to the uses of the settlement hereinbefore directed to be made as aforesaid, or as near thereto as the nature of the tenure and circumstances will permit, any thing hereinbefore contained to the contrary thereof in any wise notwithstanding.

## No. 30.

*Clause in a Will, by which the Testator, after limiting his real Estates to his Son for Life, Remainder in the strict Form to the Sons of such Son successively in Tail Male, limits the same to his two Daughters, in Moieties, with Survivorship, for Life, to take exclusively of their Husbands, with the same Remainders in Tail to their respective Children in succession, with cross ultimate Remainders ; the whole being directory of a Settlement to be made.*

AND for default of such issue, to the use of trustees and their heirs, during the lives of my said two daughters A. B. and C. D., and the life of the survivor of them, in trust, to pay the rents issues and profits thereof to such person or persons respectively, as they my said daughters respectively, and the survivor of them, by any writing or writings under their respective hands, or the hand of such survivor, shall from time to time, as the same respectively shall become due or payable, but not by way of anticipation, direct or appoint, so as that my said daughters, during their joint lives, shall not have the power of disposing of more than a moiety each, of the said rents issues and profits ; and for want of such direction and appointment, into the proper hands of them respectively, in moieties, whilst both of them shall be living, and of the survivor of them, for their and her sole and separate use, exclusively and independently of any husband with whom they respectively may happen to intermarry, and not to be in anywise subject to the controul debts or engagements of their respective husbands : and my will is, that their respective receipts in writing, and the receipt of the survivor, or the receipt or receipts of the person or persons to whom they respectively, or the survivor of them, shall direct the said rents issues and profits to be paid as aforesaid, shall be good and effectual releases and discharges for the rents issues and profits therein mentioned to be received : and upon further trust, during the lives of my said daughters, and the life of the survivor of them, to preserve the contingent uses and estates to be limited as hereinafter mentioned, and from and after the decease of the survivor of them, my said daughters, as to one undivided moiety or equal half part or share of the

same hereditaments, to the use of the first and other sons of my said daughter, A. B., successively, according to their respective seniorities, in tail male; and for default of such issue to the use of the first and other sons of my said daughter, C. D., successively, according to their respective seniorities in tail male; and as to the other undivided moiety, or equal half part or share of the same hereditaments, to the use of the first and other sons of my said daughter, C. D., successively, according to their respective seniorities, in tail male; and for default of such issue to the use of the first and other sons of my said daughter A. B., successively, according to their respective seniorities, in tail male; and from and after the decease of both my said daughters, and failure of issue male of both their bodies as aforesaid, then, as to the entirety of the same hereditaments, to the use of ———, his heirs and assigns.

No. 31.

*A Preamble to a Will, the Testator being about to go to Sea.*

IN the name of God, Amen, I, C. D., of ———, mariner, being in good health, and of sound mind, and being about to depart this kingdom, on a voyage to ———, in the kingdom of ———, and having regard to the dangers of the seas, and the uncertainty of life, do, in case I die before I return to Great Britain (1), make this my last will and testament, as follows, that is to say, &c.

No. 32.

*A general Form of a Codicil to a Will, where only some few additional Legacies are given.*

WHEREAS I, A. B., of ———, have made and duly executed my last will and testament, in writing, bearing date,

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(1) See the case of *Parsons v. Lanoe*, Ambl. 557. This will is avoided by his return.

&c. Now I do hereby declare this present writing to be as a codicil to my said will, and direct the same to be annexed thereto, and taken as part thereof; and I do hereby give bequeath, &c. In witness whereof I, the said A. B., have to this codicil set my hand and seal, this ——— day of ———.

No. 33.

*Another general Form of a Codicil to a Will, where several Legacies are revoked.*

WHEREAS I, A. B., of ———, &c. have by my last will and testament, in writing, duly executed, bearing date, &c. given and bequeathed to, &c. Now I, the said A. B., being desirous of altering my said will in respect to the said legacies, do therefore make this present writing, which I will and direct to be annexed as a codicil to my said will, and taken as part thereof; and I do hereby revoke the said legacies by my said will given to ———, and I do give to each of them the said ——— and ——— the sum of ———£ only(1); and I give unto, &c. And I do ratify and confirm(2) my said will in every thing, except where the same is hereby revoked and altered as aforesaid.

In witness, &c.

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(1) Substituted legacies stand charged upon the same fund as the original legacies.

(2) All codicils are part of the will: therefore a codicil merely for a particular purpose, *and confirming the will in other respects*, does not revive any part of the will which had been revoked by a former codicil; *Crosbie v. Macdowall*, 4 Ves. Jun. 610.



## No. 34.

*A Codicil executing a Power given by a Settlement.*

A CODICIL to be added to, and to be taken as part of the last will and testament of me M. B., of N. and W., in the county of L. Whereas by indenture of lease and release, bearing date respectively the — and — days of June, in the year of our Lord 1721, and made or mentioned to be made between me the said M. B., of N. and W., by the name of —, of the one part, and M. K., of A., in the county of Cornwall, Esquire, and T. R., of the Middle Temple, Esquire, of the other part; I, the said M. B., for the settling of the manors lands tenements and hereditaments therein mentioned, and in consideration of 10s. of lawful money, did bargain sell alien release and confirm unto the said M. K. and T. R. the manors advowsons messuages lands tenements and hereditaments therein contained, and amongst others, all that the manor or reputed manor of L., with the rights members and appurtenances thereof, in the county of B., and the messuages lands tenements and hereditaments of me the said M. B., in L. and F. aforesaid, or either of them, in the said county of B., to hold to the said M. K. and T. R., their heirs and assigns for ever, to and for the uses intents and purposes, and subject to the powers limitations and provisos thereafter expressed and contained of and concerning the same; in which said indenture of release is contained a proviso, that it should and might be lawful to and for me the said M. B., from time to time, and at any time or times during my life, by any deed or writing, to be sealed and delivered, or by my last will or testament to be signed by me in the presence of two or more credible witnesses, to revoke or alter all or any of the uses or trusts thereby limited or appointed; or to limit any other or new estate uses trusts or dispositions of or concerning the premises, or any part thereof: and whereas by indenture, bearing date the fourteenth day of October, in the year of our Lord —, and made or mentioned to be made between me the said M. B., of the one part, and T. B., of S., in the county of E., Esquire, J. L., of the parish

of St. J. within the liberty of the city of W., in the county of M., Esq., and E. R., of the parish of St. —, in the said county of M., Esq., of the other part, reciting the said hereinbefore recited indenture, and also reciting two several other indentures made subsequent thereto, whereby the uses of and concerning the said premises, in and by the said first-mentioned indenture limited and declared, were altered and revoked of and concerning the said premises, but subject to a like proviso for altering and revoking the same, and appointing new uses, as in the said first recited indenture contained; I the said M. B., in pursuance of the said power to me reserved, did revoke the uses in and by the said several recited indentures declared of and concerning the said premises, and did limit appoint and declare the same premises, to and for the uses and trusts, and under the provisos thereafter expressed concerning the same; in which indenture is also contained a proviso, that it should and might be lawful to and for me the said M. B., from time to time, and at all times thereafter, during my life, by any deed or deeds to be by me executed in the presence of two or more credible witnesses, or by my last will in writing, or codicil thereto, to be by me signed in the presence of two or more credible witnesses, to revoke or alter all or any of the uses estates and trusts thereinbefore limited or declared of or in all or any of the premises, and to limit any new or other estates uses trusts or dispositions of or concerning the same, so revoked, or any part thereof: and whereas I have made and published a will in writing, bearing date the same 14th day of October, now I the said M. B., in pursuance and by virtue of the said power to me reserved and given, in and by the said last-recited indenture of the 14th of October, in the year —, and all and every other power and powers, authority and authorities to me given or reserved, or me in anywise enabling in this behalf, do by this my codicil revoke annul and make void all and every the uses trusts estates limitations and appointments in and by the said several recited indentures, or any of them, limited created or declared of and concerning all that the said manor or reputed manor of L., with the rights members and appurtenances thereof, in the said county of B., and all the said messuages lands tenements and hereditaments of the said M. B., in L. and F. aforesaid, or either of them, in the said county of B., in and by the said first-recited indenture of release, granted released or conveyed, with their and every of their appurtenances; and I the said

M. B., in pursuance of and by virtue of all and every the power, &c. aforesaid, do direct limit appoint and declare, that the said first-recited indenture of release, and the grant and conveyance thereby made as to all that the said manor or reputed manor of L., with the rights members and appurtenances thereof, in the said county of B., and all the said messuages lands tenements and hereditaments of me the said M. B., in L. and F. aforesaid, or either of them, in the said county of B., in and by the said first-recited indenture of release, granted released or conveyed, with their and every of their appurtenances, be and enure, and I do hereby give and devise the same in manner following, that is to say, To the use of the Honourable H. B., Esq., commonly called Lord H. B., brother of His Grace the Duke of——, for the term of his natural life, without impeachment of, or for any manner of waste; and from and after the determination of that estate by forfeiture or otherwise in his lifetime, then to the use of the said T. B., I. L., and E. R., and their heirs, during the natural life of the said H. B., in trust, to preserve the contingent remainders hereinafter limited from being defeated and destroyed, and for that purpose to make entries or bring actions, as the case shall require; but, nevertheless, to permit and suffer the said H. B., during his natural life, to receive and take the rents and profits of the same premises to his own use; and from and after the decease of the said H. B., to the use of M., the wife of the said H. B., for the term of her natural life, without impeachment of, or for any manner of waste; and from and after the determination of that estate by forfeiture or otherwise, during her life, to the use of the said T. B., I. L., and E. R., and their heirs, during the natural life of the said M., in trust to preserve the contingent remainders hereinafter limited, from being defeated and destroyed, and for that purpose, to make entries or bring actions, as the case shall require; but nevertheless, to permit and suffer the said M., during her life, to receive and take the rents issues and profits of the said premises to her own use: and from and after the decease of the said M., to the use of the first son of the body of the said M., by the said H. B. begotten or to be begotten; and the heirs male of the body of such first son, lawfully issuing; and for default of such issue, to the use of the second third fourth fifth sixth seventh eighth ninth tenth and all and every the other son and sons of the body of the said M., by the said H. B. begotten or to be begotten, severally and successively, one after another, as they shall be in seniority of age.

and priority of birth, and the heirs male of their respective bodies lawfully issuing; the elder of such sons and the heirs male of his body, being always preferred, and to take before the younger of such sons, and the heirs male of his and their body and bodies; and for default of such issue male, to the use of all and every the daughter or daughters of the body of the said M., by the said H. B. begotten or to be begotten, as tenants in common, and not as joint tenants, and the heirs of their several and respective bodies lawfully issuing; and failing issue of any of the said daughters, to the use of all and every other such daughter or daughters as tenants in common, and not as joint tenants, and the heirs of the respective body or bodies of such other daughter or daughters lawfully issuing; and for default of such issue, to the use of such person or persons, and for such estate or estates, and in such proportions and in such manner as she the said M., whether covert or sole, shall, by any deed or writing, to be by her sealed and delivered in the presence of three or more credible witnesses, or by her last will in writing, or any writing purporting to be her last will, and to be by her signed and published in the presence of a like number of witnesses, limit and appoint; and in default of such appointment, then to the use of my own right heirs for ever: provided always, and my will and meaning is, that it shall and may be lawful to and for the said H. B., and after his decease to and for the said M., his wife, in case she shall survive him, by indenture to make any lease or leases of the premises, for any term or number of years, not exceeding twenty-one years from the making thereof, so as upon every such lease or leases there be reserved and made payable, during the continuance of the said respective terms thereby granted, the greatest improved yearly rent that can or may be reasonably had for the same, to be incident to and go along with the remainder or reversion expectant on such leases respectively, and so as such leases be not by any express words therein contained freed from impeachment of waste; and so also as there be contained in every such lease or leases a power of re-entry, in case the rent or rents thereupon to be respectively reserved, or any part thereof, shall be behind or unpaid by the space of twenty-one days next after any of the times of payment therein to be respectively limited; and so as the respective lessee or lessees therein named do execute a counterpart or counterparts of such lease or leases respectively; and I do hereby ratify and confirm all and every the uses trusts estates limitations and appointments in and by the said recited indenture

of the 14th of October, —, limited appointed or declared of or concerning all and every or any of the manors messuages lands tenements and hereditaments therein comprised, except and other than the said manor of L., with its appurtenances, and the lands tenements and hereditaments aforesaid, in L. and F. aforesaid, or either of them, in the county of B.; and I do also hereby declare, that my said will in writing, bearing date the 14th day of October, —, and this codicil, which I will shall be added to and deemed part thereof, do contain my last will and testament. In witness whereof, I have to this codicil, and to a duplicate thereof, both of the same tenor and effect, each contained in two skins of parchment, set my hand and seal, this — day of, &c.

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**No. 35.**

*A nuncupative Will committed to writing.*

T. B., his will by word of mouth made and declared by him on the — day of —, in the presence of us, who have hereunto subscribed our names as witnesses hereto. My will is that, &c.

(The very words)

I. G.  
R. S.  
F. G.

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**No. 36.**

*Conclusion and Attestation of a Will, written on several Sheets.*

I DO hereby make ordain constitute and appoint A. B. and C. D. executors of this my last will and testament, hereby revoking all former wills by me at any time heretofore made, and do declare this to be my last will and testament. In witness whereof I, the said T. S., have to this my last will and testament, contained in this and the four preceding sheets (or skins of parchment), set my hand and seal, (to wit) my hand to the bottom of each of the said four sheets (or skins,) and my hand and seal to this last sheet (or skin,) and my seal at the

to be paid and divided among all my said younger children, in equal shares and proportions; the respective shares of my said daughters ——— and ———, to become vested and payable upon my decease, and to carry interest from that time at the rate of ——— per cent. per annum; and the share of my said son E. to be paid on his attaining the age of 21 years; and the share and shares of such child, or such of the children which I may hereafter have by the said ———, as shall be a daughter or daughters, to be paid at her or their age or respective ages of 21 years, or day or respective days of marriage, which shall first happen, and as shall be a son or sons, at the age of 21 years. And I do hereby direct and appoint, that the trustees or trustee for the time being of the said term of years shall levy and raise, and pay to or for my said son E., and such child or children as I may hereafter have by the said ———, from the time of my decease till they respectively shall become entitled to receive their shares of the said sum of ———l., or such other sum of money as aforesaid, for or towards his or her maintenance and education, any yearly sum not exceeding the yearly sum of 200l. a-piece. And my will is, and I do hereby declare direct and appoint, that in case my said son E., or any such child or children as I may hereafter have by the said ———, shall die before his or her share, or their respective shares of the said principal money shall become payable, that then the share and shares of him her or them, or any of them so dying, shall go to and be divided between my surviving children, if more than one, in equal shares and proportions; and if only one, then the whole shall go to such one surviving child, and shall be considered as part of the original portion or portions of such child or children.



### No. 29.

*Clause in a Will, directing a Power of leasing and of selling and disposing, to be inserted in the Settlement directed to be made of the Testator's real Estates.*

AND I do hereby declare my will to be, that in such settlement there shall be contained a power to enable the said E. A.

and G. C., and the survivor of them, and the executors and administrators of such survivor, from time to time, during the continuance of the said term of 2000 years hereby limited and created, and after the determination thereof, for the person or persons, who for the time being shall, by virtue of the limitations in such settlement to be contained, be entitled to the said manors and hereditaments hereinbefore devised and comprised in the same term, for an estate of freehold, to grant demise limit or appoint the said hereditaments, or any of them, or any part thereof, for any term or number of years, not exceeding 21 years, at the most improved rent, without taking any fine, and under the usual restrictions: and also a power to enable the said E. A. and G. C., and the survivor of them, and the executors and administrators of such survivor, from time to time, and at any time or times hereafter, at the request and by the direction of the person or persons who, for the time being, shall be entitled to the hereditaments to be comprised in the settlement hereby directed to be made as aforesaid, for an estate of freehold, either in possession or in remainder, immediately expectant on the said term of 2000 years, signified by some writing, under the hand and seal, or hands and seals, of such person or persons, and attested by two or more credible witnesses, to make sale of, or to convey in exchange for, or in lieu of other hereditaments, all or any of the hereditaments to be comprised in the settlement so to be made as aforesaid, and the fee simple and inheritance thereof, as well as for the said term of 2000 years, due regard being had to the proviso next hereinafter contained or expressed, with the usual clauses, making the receipts of the said E. A. and G. C., or the survivor of them, or the executors or administrators of such survivor, effectual discharges to the purchaser or purchasers of the hereditaments which shall be so sold, and the usual directions to lay out the money to arise by such sale or sales, in the purchase of other freehold lands of inheritance, or of copyhold lands convenient to be held with the lands hereby devised, or any of them, or so to be purchased or taken in exchange, in pursuance of this my will, and to settle the lands so to be purchased, or so to be received in exchange as aforesaid, to the uses of the settlement hereinbefore directed to be made as aforesaid, or as near thereto as the nature of the tenure and circumstances will permit, any thing hereinbefore contained to the contrary thereof in any wise notwithstanding.



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